No. 4835

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF LOS ANGELES, a Municipal Corporation, GEORGE E. CRYER, Mayor of the City of Los Angeles, and ROBERT LEE HEATH, Chief of Police of the City of Los Angeles,

Appellants,

vs.

UNITED DREDGING COMPANY, a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellants:

JESS E. STEPHENS, Esq., City Attorney; LUCIUS P. GREEN, Esq., Assistant City Attorney, Byrne Building, Los Angeles, California.

For Appellee:

OVERTON, LYMAN & PLUMB, Esqs.; L. K. VERMILLE, Pacific Finance Building, Los Angeles, California.

United States of America, ss.

To United Dredging Company a corporation Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 1st day of March, A. D. 1926, pursuant to an order allowing an appeal, of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action, wherein you are plaintiff and appellee, and the City of Los Angeles, a municipal corporation, George E. Cryer, Mayor of the City of Los Angeles and Robert Lee Heath, Chief of Police of the City of Los Angeles, are defendants and appellants and you are ordered to show cause, if any there be, why the decree rendered against the said defendants and appellants in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William P. James United States Judge for the Southern District of California, this 5th day of February, A. D. 1926, and of the Independence of the United States, the one hundred and Fiftieth

Wm P. James

U. S. District Judge for the Southern District of California.

[Endorsed]: Receipt of a copy of the within Citation is hereby admitted this 5th day of February, 1926 Overton, Lyman & Plumb, attorneys for plaintiff and appellee Filed Feb 8 1926 Chas. N. Williams, Clerk By L. J. Cordes, deputy clerk

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED DREDGING COMPANY, a corporation, Plaintiff, -vs- THE CITY OF LOS ANGELES, a municipal corporation, GEORGE E. CRYER, mayor of the City of Los Angeles, and ROBERT LEE HEATH, Chief of Police of the City of Los Angeles, Defendants.	IN EQUITY. AMENDED COMPLAINT FOR INJUNCTION.

NOW COMES the plaintiff above named and complains of the defendants above named and alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of the State of Delaware.

That defendant, City of Los Angeles, is a municipal corporation organized and existing under and by virtue of the laws of the State of California and is a citizen and resident of the State of California.

That the defendant, George E. Cryer, is the duly qualified and acting mayor of the City of Los Angeles, State of California, and is a resident and citizen of the State of California .

That the defendant, Robert Lee Heath, is the duly qualified and acting Chief of Police of the City of Los Angeles, State of California, and is a citizen and resident of the State of California.

II.

That there is now in effect an ordinance of the City of Los Angeles, entitled "An Ordinance providing for the appointment of a Board of Mechanical Engineers, prescribing their powers and duties, and regulating the construction, operation and inspection of boilers and elevators and of gas and electric hoists and the operation of gas and gasoline road rollers and tractors", same being No. 33512 New Series as amended by Ordinance No. 38,872, 38,873, 41,463, and 47,456 (all New Series) of said City, and providing among other things as follows:—

SECTION 12. (AS AMENDED BY ORDINANCE No. 41, 463 (N. S.), APPROVED MARCH 4, 1921.) Every owner or user of any boiler or steam generating apparatus used for power or heating purposes, carrying over ten pounds of steam, shall, when the same is in use, employ a competent engineer

having an unexpired and unrevoked certificate of license from the Board of Mechanical Engineers, and it shall be unlawful for any such owner or user to employ or permit any person to operate or use the same, other than such an engineer having an unexpired or unrevoked certificate of license.

SEC. 13. It shall be unlawful for any person to use or operate any steam roller or steam generating apparatus of over five horsepower in the City of Los Angeles, unless such person has an unexpired and unrevoked certificate of license issued by the said Board as in this ordinance provided.

SEC. 22. It shall be unlawful for any person, firm or corporation to use or operate, or to cause or permit to be used or operated, any steam boiler or any steam generating apparatus, or any mangle or steam kettle or any cast iron heater, until the same shall have been inspected and tested and all inspection fees paid, and a certificate issued as in this ordinance provided, or unless the same is inspected and tested as often as is required by this ordinance.

SEC. 43. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than five ($5) dollars nor more than five hundred ($500) dollars, or by imprisonment in the city jail for a period of not more than six (6) months, or by both fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance."

III.

That the plaintiff is engaged in the dredging business operating dredges together with its equipment in the navigable waters along the coast of the United States under contracts with individuals, municipal corporations and the United States Government. That among its other operations, plaintiff is at the present time engaged in dredging the harbor of Los Angeles in the San Pedro District at Los Angeles, California, under a contract with the United States Government and in connection with said dredging operations is using a seagoing barge equipped with certain steam boilers and other facilities for dredging in the navigable waters of Los Angeles Harbor. That said seagoing barge equipped with facilities for dredging is known as and called a "dredge" and hereinafter referred to as such. That in the operation of said dredge, it is necessary for plaintiff to employ certain seamen to operate certain steam boilers upon said dredge and equipment. That the defendants claim said seamen are subject to the provisions of said ordinance and at numerous and sundry times have caused said seamen so operating said steam boilers

to be arrested. That unless restrained by this Honorable Court the said defendants threaten to and will have said seamen arrested and fined or imprisoned or both fined and imprisoned. That said seamen are necessary for the operation of said dredge and the performance of said contract with the United States Government. That said dredge and its equipment is operated solely in navigable waters of the United States and are vessels within the meaning of the statutes and constitution of the United States of America. That said seamen are subject solely to the control of the Federal Government and are not in any manner subject to the jurisdiction of the defendant, City of Los Angeles.

That the Federal Congress have by act duly passed governed the requirements of seamen.

IV.

That certain steam boilers on board said dredge and equipment operated as aforesaid are necessary for the operation of said dredge and equipment and the performance of said contract. That defendants claim said steam boilers on board said dredge and equipment are subject to the provisions of said ordinance.

That unless restrained by this Honorable Court, the said defendants threaten to and will have plaintiffs' officers arrested and imprisoned or will cause plaintiff to be fined.

V.

That unless defendants are enjoined and restrained from enforcing said ordinance as aforesaid, plaintiff will be compelled either to immediately abandon dredging operations in said Los Angeles Harbor, all to the great and irreparable injury of plaintiff or in order to protect its rights, to engage in dredging said Los Angeles Harbor, plaintiff will be compelled to submit to a multiplicity of suits and prosecutions.

VI.

That the value of the matter in dispute and the value to plaintiff of its rights to engage in dredging operations under contract with the United States Government for the dredging of Los Angeles Harbor is uncertain and impossible of exact determination, but is greatly in excess of Three Thousand Dollars ($3,000.00).

That the arrest of the seamen of plaintiff as alleged will greatly damage plaintiff in an amount which it is unable to state but greatly in excess of Three Thousand Dollars ($3,000.00).

VII.

That the action involves a Federal question and comes under the Federal constitution in that it violates the plaintiff's right under the 14th amendment of the Federal constitution and is a taking of plaintiff's property without due process of law and violates the provision of the Federal constitution which gives the Federal Congress control over instruments of commerce between various states and foreign coun-

tries, and is within the admiralty jurisdiction of the United States Government.

WHEREFORE, plaintiff prays;

1—That an order to show cause issue out of this Honorable Court directing and requiring defendants and each of them to appear before this Honorable Court at an early date and show cause why a preliminary injunction should not issue restraining defendants and each of them and all persons acting under their control from enforcing or attempting to enforce said ordinance or any provision thereof against plaintiff or its seamen, while engaged in dredging navigable waters of Los Angeles Harbor until the trial of this cause; and that pending the final hearing and determination of this cause the court grant a preliminary injunction enjoining and prohibiting defendants from doing all or any of the acts above set forth and that pending a hearing of the application for such preliminary injunction this court grant a restraining order enjoining and restraining the defendants and each of them from doing any of said acts.

2—That upon the trial of this action a permanent injunction be issued forever enjoining the defendants and each of them from doing any of the acts mentioned in the last paragraph.

3—For such other and further relief as may be meet and agreeable to equity.

Overton, Lyman & Plumb
Attorneys for plaintiff.

STATE OF CALIFORNIA,)
: ss.
COUNTY OF LOS ANGELES.)

C. F. Guthridge, being first duly sworn, deposes and says: That he is the vice-president of the United Dredging Company, a corporation, plaintiff named in the foregoing Amended Complaint for Injunction and that he makes this verification for and on behalf of said claimant; that he has read the foregoing Amended Complaint for Injunction and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. F. Guthridge

Subscribed and sworn to before me, this 9th day of December, 1924.

[Seal] L. K Vermille
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Am. Compl. this 10th day of Dec., 1924 Jess E. Stephens city atty Filed Dec 10 1924 Chas. N. Williams, Clerk By Edmund L. Smith, Deputy

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT FOR INJUNCTION.

Come now the defendants above named, and answering the Amended Complaint herein, admit, deny and allege as follows:

I.

Answering Paragraph III, upon information and belief, deny that the plaintiff is engaged in the dredging business, operating dredges, together with its equipment, in the, or any, navigable waters along the coast of the United States under contract with individuals, municipal corporations or the United States government; or that, among its other, or any, operations, plaintiff is at the present time engaged in dredging the Harbor of Los Angeles in the San Pedro district at Los Angeles, California, under a, or any, contract with the United States government. Deny that in connection with said, or any, dredging operations, plaintiff is using a sea going barge equipped with certain steam boilers, or other, or any, facilities for dredging in the navigable waters of the Los Angeles Harbor. Deny that said sea going barge, equipped with facilities for dredging, is known as, or called a "dredge". Deny that in the operation of said, or any, dredge, it is necessary for plaintiff to employ certain, or any, seamen, to operate certain, or any, steam barge upon said dredge or equipment. Deny that these defendants claim said, or any, seamen are sub-

ject to the, or any, provisions of said ordinance, or at numerous or any or sundry times have caused said, or any, seamen, so operating said, or any, steam barge, to be arrested. Deny that, unless restrained by this Honorable Court, these defendants threaten to, or will have said, or any, seamen arrested or fined or imprisoned, or both fined and imprisoned, or that said, or any seamen are necessary for the operation of said dredge for the performance of said contract with the United States government. Deny that said dredge, or its equipment, is a vessel within the meaning of the, or any, statutes or Constitution of the United States of America. Deny that said, or any seamen, are subject solely to the control of the federal government, or that they are not in any manner subject to the jurisdiction of the defendant, City of Los Angeles.

II.

Answering Paragraph V, upon information and belief, deny that unless defendants are enjoined or restrained from enforcing said ordinance plaintiff will be compelled, either to immediately abandon dredging operations in said Los Angeles Harbor, to the, or any, great or irreparable injury of plaintiff, or in order to protect its rights to engage in dredging said Los Angeles Harbor, plaintiff will be compelled to submit to a multiplicity of suits or prosecutions.

III.

Answering Paragraph VI, deny that the value of the matter, or any matter, in dispute, or the value to

plaintiff of its rights to engage in dredging operations under contract with the United States government for the dredging of Los Angeles Harbor is uncertain, or impossible of exact determination, or is greatly in excess of Three Thousand Dollars ($3,000.00) or any other sum, and allege that the operations of plaintiff in relation to the dredging of said harbor are not differently or otherwise affected under said ordinance than are the business operations of other persons, firms or corporations subject to the regulations thereof. Deny that the arrest of the, or any, seamen of plaintiff will greatly, or otherwise damage plaintiff in an, or any, amount, or in excess of Three Thousand Dollars ($3000.00), or any other sum.

IV.

Answering Paragraph VII, deny that the action involves a federal question, or comes under the federal constitution in that it violates the plaintiff's right under the Fourteenth Amendment of the Federal Constitution, or is a taking of plaintiff's property without due process of law, or violates the, or any, provision of the Federal Constitution which gives the federal Congress control over instruments of commerce between various states or foreign countries, or is within the admiralty jurisdiction of the United States government.

WHEREFORE, Defendants pray that plaintiff take nothing by this action and for such other and further

relief as may seem to the Court meet and proper, and for their costs herein expended.

Jess E Stephens
City Attorney.
Lucius P. Green
Assistant City Attorney.
Attorneys for the Defendants herein.

STATE OF CALIFORNIA :
: ss.
COUNTY OF LOS ANGELES:

ROBT. DOMINGUEZ, being first duly sworn, deposes and says: That he is an officer of the City of Los Angeles, one of the defendants in the above entitled action, to-wit, City Clerk of said City, and as such officer he makes the following verification:

That he has read the foregoing Answer to Amended Complaint for Injunction, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters, he believes it to be true.

Robt Dominguez

Subscribed and sworn to before me this 23rd day of March, 1925.

[Seal] Herbert S Payne.
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within this 23rd day of March 1925 Overton, Lyman & Plumb Attorney for plaintiff Filed Mar 24 1925 Chas. N. Williams, Clerk By L. J. Cordes, Deputy

[Title of Court and Cause.]

FINAL DECREE FOR INJUNCTION

This cause came on for final hearing before Honorable Wm. P. James, Judge of the above entitled court, on the 8th day of December, 1925, upon the pleadings, and proofs of the respective parties comprising the testimony of numerous witnesses, as well as exhibits ,and having been argued by counsel and submitted on briefs and the court being fully advised in the premises; now, therefore, upon consideration thereof,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants, City of Los Angeles, a municipal corporation, George E. Cryer, Mayor of the City of Los Angeles, Robert Lee Heath, Chief of Police of the City of Los Angeles, and each of them and all persons acting under their control are hereby perpetually enjoined and restrained from enforcing or attempting to enforce that certain ordinance of the City of Los Angeles known as No. 33512 New Series, as amended by Nos. 38872, 38873, 41463 and 47457 New Series, or any provision thereof, requiring the inspection of steam boilers or steam generating apparatus or the licensing of operators of steam boilers or steam generating apparatus on plaintiff's dredge while engaged in dredging in the navigable waters within the city limits of Los Angeles.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff do recover from de-

fendants its taxable costs of suit herein amounting to the sum of $46/00 and that execution issue therefor.

Dated, Los Angeles, California, January 19, 1926.

Wm P James
District Judge.

Approved as to form as provided in Rule 44.

Jess E. Stephens City Attorney
Lucius P. Green Assistant.
Attorneys for Defendants.

Decree entered and recorded Jan. 19th—1926.

CHAS. N. WILLIAMS, Clerk.
By Murray E. Wire, Deputy Clerk

[Endorsed]: Filed Jan 19 1926 Chas. N. Williams, Clerk By Murray E. Wire Deputy Clerk

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[Title of Court and Cause.]

STIPULATION.

CONSOLIDATING CAUSE ON APPEAL WITH THAT OF FRED C. FRANKS, et al., VS CITY OF LOS ANGELES, et al., NO. H-120-J.

WHEREAS, the facts and matters at issue in the above entitled case are identical with those in the case of Fred C. Franks, et al., vs. City of Los Angeles, et al., No. H-120-J; and

WHEREAS, upon stipulation of the parties and the order of the court the said action of Fred C. Franks, et al., vs. City of Los Angeles, et al., No. H-120-J, was tried upon the evidence introduced in the above

entitled action and judgment therein rendered by the court upon the said evidence;

NOW, THEREFORE, for the purpose of conserving the time of the honorable United States Circuit Court of Appeals, it is hereby stipulated and agreed by and between the undersigned solicitors for the respective parties hereto that the appeal of defendants in the said action of Fred C. Franks, et al., vs. City of Los Angeles, et al., No. H-120-J, taken simultaneously herewith, shall be consolidated herewith and be presented and heard upon the transcript of record on appeal. including the statement of evidence presented on appeal herein, and that the transcript of the record and briefs on appeal of the parties hereto, shall bear the titles of both causes and shall apply to each to the same extent as if presented separately.

Dated this 26th day of March, 1926.

Overton, Lyman & Plumb
L. K. Vermille
Solicitors for Plaintiff and Appellee.
Jess E Stephens
City Attorney
and
Lucius P. Green
Asst. City Attorney
Solicitors for Defendants and Appellants.

In so far as it is proper for me to direct the consolidation of the causes for presentation to the Circuit Court of Appeals, it is ordered that the same be

(Testimony of Fred C. Franks.)
done in accordance with the foregoing stipulation. March 20 1926

Wm P James
Dist Judge

[Endorsed]: Filed Mar 20 1926 Chas. N. Williams, Clerk By L J Cordes Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

Hon William P. James, Judge Presiding.

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UNITED DREDGING COMPANY, a corporation, Plaintiff, -vs- CITY OF LOS ANGELES, et al., Defendants. NO. H-121-J.

FRED C. FRANKS, et al., Plaintiffs, -vs- CITY OF LOS ANGELES, et al., Defendants. NO. H-120-J.

——oOo——

FRED C. FRANKS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am in the business of dredging and reclamation contracting. We operate dredges around San Francisco Bay on the Sacramento and San Joaquin Rivers and in the vicinity of San Pedro and Long Beach. We started operating dredges in San Pedro in the

(Testimony of Fred C. Franks.)

fall of 1923 under contract with the United States Government and have been there ever since. Our dredging equipment consists of clam shell dredges, hopper barges and suction dredges. At San Pedro we were operating the clam shell dredge "Monterey" and the suction dredge "Seattle". The photograph shown me (Plaintiff's Exhibit No. 1) is of the dredge "Seattle"; the dredge "Seattle" consists of dredging machinery made on a hull of the required depth and staunchness to be towed at sea. It was towed from Puget Sound to San Pedro, the trip occupying eight or ten days. I do not know whether this dredge had ever been to sea before. It is necessary to employ a crew of men on these dredges during their operation. We have operated the dredge "Seattle" in Los Angeles and Long Beach Harbors only. In Los Angeles Harbor we operated principally opposite Fifth Street in water ten to thirty feet in depth above high tide, for the purpose of deepening and widening the harbor. We didn't run our dredge into shallow water. The value of the dredging operations upon which we were engaged is in excess of $3,000.00. During the operation of the dredge operating in San Pedro Harbor, some of our employees were arrested and the damage we will sustain from the arrest of these employees, if continued, would be in excess of $3,000.00.

The dredge "Seattle" is a 20 inch suction dredger. Arrests of employees were made on both the dredger "Seattle" and the dredger "Monterey" in Los Angeles

(Testimony of Fred C. Franks.)

Harbor. The suction pipe dredge deposits material upon adjacent land through a pipe line which was the operation we were engaged in in Los Angeles Harbor. We operated our dredgers in Los Angeles Harbor for a little over a year starting in 1923, and finishing in 1924. The steam equipment on the dredge "Seattle" consists of two Scotch marine boilers. We bought the "Seattle" at Seattle, Washington, in July or August, 1923, for the purpose of operating her in Los Angeles Harbor. She is about twelve years old. Her boilers have been inspected. Her boilers have never been inspected by the Federal Government during any time we owned her. To operate the dredge we employ a chief engineer and three assistants and three oilers and all of the engineers and assistants have Federal licenses. At the present time, the dredge "Seattle" is tied up in Long Beach Harbor.

We built the clam shell dredge "Monterey" at Pittsberg, California, on the Upper San Francisco Bay, about 1910 or 1911 and she was brought to Los Angeles October 23rd, a month or a month and a half later than the "Seattle"; and we have operated her off and on in Los Angeles Harbor ever since we brought her down here. The "'Monterey" has a Scotch marine boiler and a donkey boiler. The boilers have never been inspected by the Federal Government at any time.

(Testimony of R. N. Thorsheim.)

R. N. THORSHEIM

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am Captain of the suction dredger "Seattle" and have been so ever since the latter part of 1912 when it was built. I am familiar with the "Seattle" and her construction and equipment. She is constructed of 12 by 12 timbers surfaced and 12 by 12 surfaced running fore and aft, with 4 inch planks on the outside of that. The picture you show me (Plaintiff's Exhibit No. 1) is of the dredge "Seattle". I have taken trips to sea with the "Seattle" three different times; first from Seattle to Marshfield, Oregon and from Marshfield, Oregon back to Seattle; from Seattle to Aberdeen, Washington, and from Aberdeen, Washington back to Seattle and from Seattle to San Pedro, California. I have done dredging at Coos Bay, Oregon, and the trips that I have testified to were made on the high seas. On the trip from Coos Bay to Seattle, upon leaving Coos Bay, or Marshfield, it was blowing a northwest gale, but we managed to get over the bar on the afternoon of the 9th of November, and it was blowing a stiff breeze that afternoon and also the following night and the next day. The second night it got very rough, a real rough sea, and a little before midnight our hawser broke. The hawser was a 2 inch steel cable. We had northeast gales with hail storms and we were adrift all night until the next morning about eight o'clock because the

(Testimony of R. N. Thorsheim.)

tug could not get close enough to take us up. We happened to be about thirty miles off shore when this happened. The "Seattle" weathered and rode the sea well, without the least bit of damage and no leaks, notwithstanding, the breakers continually washed the decks. We had no trouble with her in the least. She was just as sound when we got back to Seattle as the day we left Seattle on the voyage. I was on the dredge on a trip from Seattle down to San Pedro and had no trouble with her at sea. I was on the "Seattle" when several of my men were arrested; I was one of them, one was an assistant engineer and one was a fireman. (It was here stipulated between counsel that the arrests testified to were made by officers of the City of Los Angeles acting under and by authority of Ordinance No. 33,512 and amendatory ordinances Nos. 38,873, 41,463 and 47,457, which ordiances were introduced in evidence as Plaintiff's Exhibit No. 2).

These dredges are planked with 4 inch planks on the bottom outside of the timber that runs fore and aft making it practically 27 inches or 26½ inches, or whatever it may be, that the timbers are surfaced and there are two 12 by 12's with a 4 inch plank at the outside from 7 feet up and the last 5 feet, they are cut out. The decks are 4 inches of split timber and the superstructure house or cabin is of course built as an ordinary or a heavy house.

We moved the dredger "Seattle" in the month of November, 1914, the latter part of 1914; she was

(Testimony of Charles O. Lendelof.)

towed by the tug "Goliath" and she was also towed when she was brought to Los Angeles Harbor from Seattle. On the trip from Seattle to Los Angeles Harbor we left Seattle on the 29th of August, 1923.

I would call the hull of the dredger a barge float; it has a 12 foot draft and the depth below water line is about 7 feet. She is decked over with the exception of the engine and boiler rooms, these being located inside of the hull, as is also practically all of the suction machinery.

CHARLES O. LENDELOF,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Charles O. Lendelof. I am in the business of dredging with the Franks Construction Company, in which business I have been engaged for the last twenty-five years. I am familiar with the dredge "Seattle" and I know generally how she is constructed. The bottom of the dredge is approximately around 27 inches, three courses of timbers; the sides are 12 by 12 running solid up to above the water line and every intermediate stanchion is left out for ventilation space and the outside is 6 inch planking and the decks 4 inch. The photograph you show me is of the dredge "Seattle". (Plaintiff's Exhibit No. 1).

I am a sort of a manager for the Franks Construction Company. I know that the dredge "Seattle" was taken to sea and I remember when she was taken from Seattle to Coos Bay and back again down here.

(Testimony of Andrew Young.)

Approximately the dimensions of the dredge "Seattle" are 151 feet over all, 40 feet beam, about 12 feet deep. She draws about 7 feet of water the way she stands today.

ANDREW YOUNG,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Andrew Young. I am an engineer and marine surveyor. I have been a marine surveyor since 1912. My duties as a marine surveyor are to make surveys on the different vessels for the purpose of insurance prior to their going to sea, I am familiar with the dredges "Seattle" and "San Francisco." I have been on board of them and looked them over. They are heavily constructed for sea going. The dredges are constructed with heavy timber and braces fore and aft and bulk headed. I would call the dredge "Seattle" a barge, which is able to go to sea and I would recommend insurance on her to go on the high seas.

Prior to my becoming a marine surveyor I was a marine engineer and superintending engineer for the Wilmington Transportation Company for 37 years.

I have made surveys upon barges for the purpose of insurance. There are barges in use in Los Angeles Harbor at the present time. Their principal use is carrying rock from Catalina Island to the construction work around the harbor. Some of them are capable of carrying about 1100 tons, some of them 600,

(Testimony of D. E. Hughes.)

some of them 400 and some of them 200 tons. They are from 100 to 150 feet in length and about 35 to 45 feet beam and 8 or 10 feet depth of hold. They are towed by tug boats as a rule and those that carry rock from Catalina are towed across the channel to Catalina Island and back again. There are similar barges used in carrying lumber and products of that sort running on the coast. They carry a deck load and also a load in the hull. They are not like rock barges. They are decked over with hatches and they are always towed and they go as far north as Seattle to get lumber and bring it down to Los Angeles. Other barges are used for oil. Barges are also used as dredgers, with pile drivers, some with booms on them for clam shell dredges. Aside from the dredges and leaving the dredgers out of consideration, barges in the harbor are used also to transport goods around from one place to another on tow. Harbor barges are used generally for carrying lumber and other commodities around the harbor.

These dredges are constructed on barges; they become a dredge when the machinery is installed. They are nothing more than barges with machinery installed for dredging.

D. E. HUGHES,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is D. E. Hughes. I am a civil engineer employed by the War Department. I am familiar

(Testimony of Charles F. Guthridge.)

with dredging operations around San Pedro Harbor. These dredges operate in the navigable waters of San Pedro Harbor.

CHARLES F. GUTHRIDGE,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Charles F. Guthridge. I am Vice-president of the United Dredging Company, dredging and reclamation work. We operate dredges in navigable waters of the United States. We were dredging in San Pedro Harbor during the year 1924. We were operating opposite San Pedro on the Terminal Island side in the navigable waters of the Harbor. The picture you show me is a picture of the clam shell dredge "San Francisco." (Plaintiff's Exhibit No. 3). She is one of our dredges and was one of the dredges that we were operating during August 1924. The dredge "San Francisco" is built of wood, very heavy timbers with cross keelsons, made in barge form, with machinery for clam shell dredge placed thereon. They are constructed of heavy timbers so as to make it possible for them to go to sea. The "San Francisco" has gone to sea between Los Angeles Harbor and San Francisco over five or six times during all kinds of weather. The value of our dredging operations at San Pedro is in excess of $3,000.00 and if the arrest of our men employed on these dredges continues we will be damaged more than $3,000.00.

(Testimony of Samuel A. Kennedy, Jr.)

I have known the "San Francisco" for about 17 years. She has operated in San Francisco Harbor. I am fairly familiar with these dredges. They can be towed between any harbors either on this Coast or on the Atlantic Coast with safety during the time of a severe storm. I think there are two boilers on the "San Francisco". These boilers have been inspected by the City of Los Angeles but to my knowledge there has been no inspection by the Federal Government.

We have towed dredges of similar construction from this Coast to Honolulu and also from here to the Atlantic Coast and vice versa around through the Panama Canal and on the Atlantic Coast on the high seas. Our dredges are enrolled in New York.

SAMUEL A. KENNEDY, JR.,

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is Samuel A. Kennedy, Jr., and my occupation is local inspector of hulls for the district of Los Angeles. I have been in that occupation since August 8, 1918, during which time I have been in the local district. I am not very familiar with the dredges operated in Los Angeles Harbor. I know there are dredges operating in Los Angeles Harbor and have seen them operating there from time to time. I have never inspected these dredges at any time in the performance of my duties, neither hulls nor boilers and I have never had any instructions to inspect these vessels by my Department. We inspect all ves-

(Testimony of Samuel A. Kennedy, Jr.)

sels propelled in whole or in part by steam, sailing vessels over 700 gross tons carrying passengers for hire, motor vessels of above 15 gross tons that carry freight or passengers for hire and sea-going barges. We inspect seagoing barges that have crew's accommodations on board and a barge is a vessel that is engaged in trade and are the ones that we inspect and according to our instructions they shall carry their crews under a deck to distinguish them from a scow. If such a barge was carrying a regular load between Catalina Island and the Harbor in tow without crew's quarters, we would not inspect it. All that we inspect is engaged in trade. It is engaged in the commercial field in carrying cargoes, a type of carrier, but regardless of whether it carries cargoes or not, or whether it travels the high seas, we do not inspect it unless it is equipped with crew's quarters. We inspect their hulls and certain equipment consisting of a life boat, anchors, life preservers and the necessary equipment for a life boat. The pamphlet you show me entitled "Department of Commerce, Steamboat Inspection Service, General Rules and Regulations prescribed by the Board of Supervisors, Ocean and Coastwise", dated April 24, 1924, contains the rules and regulations promulgated by the Board of Supervising Inspectors by which I am limited in the performance of my duties as an inspector. The custom house determines whether a vessel is required by law to be inspected and if so a certificate of inspection is issued by our service. The first that we know that a vessel

(Testimony of Joseph A. Moody.)

is to be inspected is when the application for inspection is made.

We do not inspect sailing vessels coming into port under 700 gross tons. Many sailing vessels have donkey boilers on board, but I cannot name them off hand. We do not inspect them.

JOSEPH A. MOODY,

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

My name is Joseph A. Moody. I am local inspector of boilers, steam boat inspection service stationed at San Pedro. I have been there since August, 1921, and in the capacity of local inspector since September, 1923. I am not very familiar with the dredges operating in the Harbor of Los Angeles. The only one that I am familiar with was one operated by the United States Government but I have had nothing to do with any dredges operated by private individuals or corporations, nor have I had any occasion to inspect any such dredges, neither the hulls nor boilers. I have never been aboard one of them. The type of vessels we inspect are those flying the American flag and subject to the rules and regulations of the steam boat inspection service which are propelled in whole or in part by steam or motor. In my capacity as inspector of boilers, I do not inspect seagoing barges. That is entirely up to the inspector of hulls, not the steam inspector. I would define a seagoing barge the same way as it was defined by Samuel A. Kennedy, Jr., who preceded me on the stand.

Plaintiff introduced in evidence as its Exhibit No. 2 the following ordinance of the City of Los Angeles, and amendments thereto:

PLAINTIFF'S EXHIBIT NO. 2.

ORDINANCE NO. 33512
(New Series)
of the
CITY OF LOS ANGELES.

An Ordinance providing for the appointment of a Board of Mechanical Engineers, prescribing their powers and duties, and regulating the construction, operation and inspection of boilers and elevators and of gas and electric hoists and the operation of gas and gasoline road rollers and tractors.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Sec. 5. Before being permitted to take an examination, each applicant for an engineer's license shall make and file with the secretary of the said board an affidavit, in writing, as to his previous experience, stating the number of years and in what capacity he has served about an engine or boiler, types of and horse-power of engines and boilers, where and by whom he was employed and the length of time he was employed by each person, firm or corporation. Such affidavit shall accompany the application for an engineer's license. Each such application, together with the affidavit accompanying the same, shall be presented to the said Board by the secretary at the first

regular meeting of the said Board after the same is filed, and no further action shall be taken thereon for a period of two weeks. During such period the secretary shall, if so directed by the said Board, verify the statements contained in such affidavit.

Sec. 8. The Board of Mechanical Engineers shall have power, by a four-fifths (4-5) vote, to revoke an engineer's license, or a renewal thereof, for violation of any provision of this ordinance or for inebriety, dishonesty or neglect of duty while in charge of an engine or boiler in use, or for absenting himself for more than ten consecutive minutes from the engine or boiler in his charge, while such engine or boiler is in operation, without leaving in charge of such engine or boiler an engineer holding an unexpired and unrevoked certificate of license issued as provided by this ordinance.

The said Board shall have power, by a majority vote, to suspend an engineer's license, or a renewal thereof, for a period of not exceeding thirty (30) days, for any of such causes.

No such license or renewal shall be revoked until a hearing shall have been had by the said Board in the matter of the revocation of such license or renewal, notice of which hearing shall be given in writing, and served at least three days prior to the date of hearing upon the holder of such license, which notice shall state the ground of complaint against the holder of such license and shall also state the time when and the place where such hearing will be had. Such notice shall be served upon the holder of such license by

delivering the same to such person, or by leaving such notice at the place of business or residence of such persons with some person of suitable age and discretion. If the holder of such license cannot be found and service of such notice cannot be made upon him in the manner hereinbefore provided, then a copy of such notice shall be mailed, postage fully prepaid, addressed to such holder of such license at such place of business or residence, at least three days prior to the date of such hearing.

Sec. 11. Every applicant for a license who fails to pass the examination of the Board of Mechanical Engineers, shall be required to wait for four weeks before making another application, and thereupon the said Board shall give such applicant another examination. Any applicant who fails to pass the examination upon the third trial shall not be permitted to make another application within the period of six months thereafter.

Sec. 12. (As amended by Ordinance No. 41463.) Every owner or user of any boiler or steam generating apparatus used for power or heating purposes, carrying over ten pounds of steam shall, when the same is in use, employ a competent engineer having an unexpired and unrevoked certificate of license from the Board of Mechanical Engineers, and it shall be unlawful for any such owner or user to employ or permit any person to operate or use the same, other than such an engineer having an unexpired or unrevoked certificate of license.

Sec. 13. (As amended by Ordinance No. 41463.) It shall be unlawful for any person to use or operate any steam boiler or steam generating apparatus of over five horsepower in the City of Los Angeles, unless such person has an unexpired and unrevoked certificate of license issued by the said Board as in this ordinance provided.

Sec. 22. It shall be unlawful for any person, firm or corporation to use or operate, or to cause or permit to be used or operated, any steam boiler or any steam generating apparatus, or any mangle or steam kettle or any cast iron heater, until the same shall have been inspected and tested and all inspection fees paid, and a certificate issued as in this ordinance provided, or unless the same is inspected and tested as often as is required by this ordinance.

Sec. 27. (As amended by Ordinance No. 38872.) It shall be unlawful for any person, firm or corporation to erect or use or to cause or permit to be erected or used, any boiler or other steam generating apparatus without first obtaining a permit therefor, in writing, from the Board of Fire Commissioners. After obtaining such permit, such person, firm or corporation shall obtain an additional permit from the Board of Mechanical Engineers for the erection, use and location of each boiler or other steam generating apparatus. Before such permit is obtained from said Board of Mechanical Engineers the person, firm or corporation applying for such permit shall file with the said Board a detailed statement, in writing, showing the size and construction of the boiler, or boilers,

sought to be erected, used or located. It shall be the duty of the Board of Mechanical Engineers to charge and collect for the granting of each such permit a fee of one ($1) dollar.

Sec. 28. (As amended by Ordinance No. 38872.) Every boiler shall be inspected internally and externally and given the hydrostatic test before being enclosed with any brick or masonry. Every boiler carrying more than ten (10) pounds pressure of steam shall be hung upon side lugs or by means of buckles and hooks, suspended from steel I-beams or on steel rails of sufficient strength to sustain six times the combined weight of the boiler and water when such boiler is filled with water. No boiler carrying more than ten pounds pressure of steam shall be supported by a stand base at the back and bottom of the shell, but the same shall be hung by the side or suspended from the top as hereinbefore provided.

Sec. 29. (As amended by Ordinance No. 38872.) It shall be unlawful for any person, firm or corporation to connect any blowoff pipe from a steam boiler or steam generating apparatus directly with any sewer, or to cause or permit any such pipe so to be connected, or to use, or to cause or permit to be used, any such pipe when the same is so connected. Steam shall be blown into a sump tank and the water in such tank shall be pumped or siphoned into a sewer.

Every steam boiler shall have a check valve on the city water supply pipe between the boiler and the stop cock or feed valve.

Sec. 30. (As amended by Ordinance No. 38,872 (N. S.), approved April 17, 1919). Every boiler or steam generating apparatus operated in the City of Los Angeles shall be constructed and maintained in accordance with the provisions of this ordinance, and in accordance with the Boiler Safety Orders adopted by the Industrial Accident Commission of the State of California, effective Jannuary 1, 1917, or as said orders may from time to time be amended, altered or revised, and to the satisfaction of the Board of Mechanical Engineers.

Sec. 31. It shall be unlawful for any person, firm or corporation to permit any boiler or steam generating apparatus, or other apparatus mentioned in this ordinance, to be subjected to or to carry a greater pressure than is allowed and stated in the certificate of inspection thereof, or to use, or to cause or permit to be used, any such boiler or steam generating apparatus, or other apparatus, after the same shall have been condemned as unsafe by the Board of Mechanical Engineers and before the same shall have been reconstructed or repaired to the satisfaction of the said Board.

Sec. 43. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than five ($5) dollars nor more than five hundred ($500) dollars, or by imprisonment in the city jail for a period of not more than six (6) months, or by both fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

Sec. 44. That Ordinance No. 28,972 (New Series), entitle, "An Ordinance providing for the appointment of a Board of Mechanical Engineers and of a Boiler and Elevator Inspector, and regulating the construction and operation of boilers and elevators and of gas and electric hoists and the operation of gas and gasoline road rollers and tractors," approved January 8, 1914, and all ordinances amendatory thereto or thereof, and all other ordinances in conflict with this ordinance, be and the same are hereby repealed.

Jess E. Stephens,
City Attorney,
and
Lucius P. Green,
Asst. City Attorney,
Solicotors for Defendants and Appellants.

APPROVAL OF STATEMENT OF THE EVIDENCE.

The matter of the settlement of the foregoing statement coming before the court and no objections or amendments to said statement having been proposed, and it having been stipulated between the respective parties by written stipulation on file in this cause that

the foregoing statement of the evidence is complete, and waiving notice of the time and place of presentation of the same for approval, and it appearing to the court that the same is true and complete,

IT IS HEREBY approved as true, complete and properly prepared.

Dated this 20 day of March, 1926.

Wm P. James

Judge.

[Endorsed]: Filed Mar 20 1926 Chas. N. Williams, Clerk By L. J. Cordes, Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISON.

UNITED DREDGING COMPANY, a corporation, Plaintiff vs. THE CITY OF LOS ANGELES, a municipal corporation, GEORGE E. CRYER, Mayor of the City of Los Angeles, and ROBERT LEE HEATH, Chief of Police of the City of Los Angeles, Defendants. No. H-121-J. Eq.

OPINION.

Messrs. Overton, Lyman & Plumb; Attorneys for plaintiff.

Jess E. Stephens, Esq.; Attorney for Defendants.

Plaintiff is engaged in operating a dredge for the purpose of deepening navigable waters in the harbor of Los Angeles, under contract with the United States government. Defendant city, by its ordinance, has

created a board of Mechanical Engineers, which board is required to examine and license operators of steam boilers and steam-generating apparatus. By the ordinance, it is made a misdemeanor for any person to operate such boilers or apparatus without having been duly licensed by the Board of Mechanical Engineers. Employees of the plaintiff, engaged in operating a dredge in the harbor of San Pedro, were threatened with arrest because they had not been licensed by said city authorizing them to be so employed. The city admits that it will, unless restrained, cause the arrest of plaintiff's employees, and contends that in so doing it will act properly within the scope of the police power with which it is invested. Plaintiff, on the other hand, contends that the city has no right or power to regulate or supervise the employees of the plaintiff because; (1) Such employees are engaged in maritime work upon the navigable waters of the United States, and hence are seamen; (2) That the United States has acted to cover the field and provide for inspection of maritime craft such as dredges employed upon navigable waters.

It was shown by the evidence that the dredge as used by the plaintiff is built in barge form, heavily constructed to withstand weather and water in the open sea, and that it is suited to and has been towed from point to point along the Pacific Coast. On one occasion it was shown that the dredge had withstood a heavy storm in the Pacific when the tow-line had parted which connected it with a steamer or tug-boat.

Upon the barge body are mounted cabin structures and the principal man in charge is called a captain or master. The master who was in charge of the dredge in question had served in that capacity for several years. He appeared to be experienced both in the operation of the dredge and in the handling of it while under tow. The boilers and engine constitute the mechanical equipment, all of which are used solely for the purpose of operating the dredging shovels. The dredge possessed no means of self-propulsion.

The effort of the city was to show under the first head that a barge, in order to be the subject of maritime jurisdiction, must be engaged in commerce as a carrier either of freight or passengers. I do not believe that such a limited classification comports with maritime practice. Here we have a large floating barge entirely disconnected from the shore except during the time that it may discharge through a pipe the matter lifted by a shovel, engaged upon navigable waterways, deepening, widening and clearing them for water-borne traffic, and being moved from place to place as the needs of navigation require. It operates in the use we have described, in assistance to, and in aid of, navigation.

The Supreme Court of the United States, in Ellis vs. U. S., 206 U. S. 246, denominated scows and floating dredges as vessels within the admiralty jurisdiction and held that the employees were "seamen". Judge Cochran, of the District Court of Kentucky, in Barnes Co. vs. One Dredge Boat, has collected many authorities to the same point. By practical reasons

this view is also supported. A dredge of the kind and character here involved, employed in its work of aiding navigation, enlarging and deepening harbors and waterways, is subject to continual change of location. Its work may place it within the corporate limits of one municipality one day and some other on the next, in endless rotation. It would be a substantial interference with its operation if the men employed to manage the mechanical equipment were called upon to meet different qualification requirements of the various local governments.

I conclude on the first question that the work of the steam dredge is maritime and that the structure is a sea-going barge.

As to the second contention, it may be admitted that reasonable police regulations may be imposed upon maritime craft where considerations of safety are present in the locality under the jurisdiction of a municipality. Such regulations must be reasonable ones and may be enforced provided that the United States government has not already taken posssession of the field in which it has primary jurisdiction. The law applicable was well stated by Judge Brown in The City of Norwalk, 55 Fed. 98, where he said that the rule in favor of federal jurisdiction did not "exclude general legislation by the states, applicable alike on land and water, in the exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of Congress,

nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and state relations." The Shipping Act of 1908, Sec. 10 (35 Stat. at L. Vol. 1, page 428), provides for the inspection of the hull and equipment of seagoing barges. In my opinion that law fully authorizes the inspection of dredger barges and their equipment, which latter consists largely of the boiler and engines. There was evidence offered to show that it is not the practice of the department charged with the duty to make inspection of vessels, to inspect barges unless they are used directly in the work of transporting passengers or freight. But if the statute has, as I have concluded, brought dredges of the kind involved in this suit within the federal inspection field, then it matters not whether the officers charged with inspection duty in practice include or exclude such a barge from inspection.

It follows that decree should be in favor of the plaintiff, due exception of defendants to the entry thereof will be allowed.

Dated this 12 day of January, 1926.

Wm. P. James,
District Judge.

[Endorsed]: Filed Jan 12 1926 Chas. N. Williams, Clerk By Murray E. Wire, Deputy Clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the defendants in the above entitled cause and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 12th day of January, 1926, and entered on the 19th day of January, 1926.

I.

That the United States District Court for the Southern District of California erred in rendering its decree in favor of the plaintiff, enjoining the defendants from enforcing the provisions of Ordinance No. 33,512 (New Series) and amendments thereto as to the steam dredges operated by the plaintiff in the navigable waters within the city limits of the City of Los Angeles, and the errors complained of by these defendants are as follows:

1. It was error to hold that the dredges operated by the plaintiff in the waters of Los Angeles harbor are seagoing barges, within the contemplation of the Shipping Act of 1908, Sec. 10 (35 Stats. at L. Vol. 1, page 6428) providing for inspection of seagoing barges, or of any other act of the United States.

2. It was error to hold that the Shipping Act of 1908, Section 10 (35 Stats. at L. Vol. 1, page 428) providing for inspection of seagoing barges, authorizes or even contemplates the inspection of steam dredges.

3. It was error to hold that Congress had legislated upon the subject of inspection of dredges and their equipment by the enactment of said Section 10 of the said Shipping Act of 1908, and thereby excluded legislation upon the subject by the City of Los Angeles.

4. It was error to hold that said Sections 4438 and 4441, Chapter 1, Title III, Revised Stats. of U. S., providing for examination and licensing of engineers of steam vessels, apply to or even contemplate employees on steam dredges.

5. It was error to hold that dredges are steam vessels within the contemplation of said Sections 4438 and 4441, Chapter 1, Title III, Revised Stats. of U. S.

6. It was error to hold that Congress had legislated upon the subject of licensing dredger employees, by the enactment of said Sections 4438 and 4441, Chapter 1, Title III, Revised Stats. of U. S., to the exclusion of legislation upon the subject by the City of Los Angeles in the lawful exercise of its police power.

WHEREFORE, appellants pray that said decree be reversed and that said injunction be dissolved and that said District Court for the Southern District of California be ordered to enter a decree reversing its decision and dissolving said injunction in said cause.

Jess E. Stephens,
CITY ATTORNEY,
and
Lucius P. Green
ASSISTANT CITY
ATTORNEY
Attorneys for defendants

[Endorsed]: Filed Feb 5 1926 Chas. N. Williams, Clerk, By R S Zimmerman Deputy Clerk.

[Title of Court and Cause.]

PETITION FOR APPEAL

TO THE HONORABLE WILLIAM P. JAMES, JUDGE OF THE UNITED STATES DISTRICT COURT:

The above named defendants, feeling aggrieved by by the decree rendered in the above entitled cause on the 12th day of January, 1926, and entered on the 19th day of January, 1926, hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in the City and County of San Francisco, State of California, under the rules of such court in such cases made and provided.

And your Petitioners further pray that a proper order relating to the security for costs to be required of it be made.

Jess E Stephens,
City Attorney
Lucius P. Green
Assistant City Attorney
Solicitors for Defendants.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Wm P James
Judge of said United States District Court.

[Endorsed]: Filed Feb 5 1926 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk

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[Title of Court and Cause.]

STIPULATION FOR COSTS ON APPEAL.

THE CITY OF LOS ANGELES, a Municipal Corporation, GEORGE E. CRYER, Mayor of the City of Los Angeles, and ROBERT LEE HEATH, Chief of Police of the City of Los Angeles, having filed, or being about to file a petition for appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from the judgment filed and entered in this matter in this Court, on the 19th day of February, 1926.

NOW THEREFORE, the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, authorized to do a generatl surety business, as Surety, hereby undertakes in the sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, and promises on the part of the said Defendants, that they will pay all costs and damages which may be awarded against them on the said appeal, or on the dismissal thereof; and the undersigned Surety further consents that in case of default or contumacy on the part of the said Defendants, execution to the

amount named in this stipulation may issue against the goods, chattels and lands of the undersigned.

SIGNED, sealed and dated this 4th day of February, 1926.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By Harry D. Vandeveer
Attorney in Fact.

Attest S. M. Smith
Agent. (SEAL)

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

On this 4th day of February, 1926, before me T. E. Seaton, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared Harry D. Vandeveer and S. M. Smith known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and ackowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

(SEAL) T. E. Seaton
Notary Public in and for the State of California,
County of Los Angeles.

Examined and recommended for approval as provided in Rule #29.

Jess E. Stephens

Attorney

I hereby approve the foregoing bond

Dated the 4th day of Feb. 1926.

Wm. P. James

Judge.

[Endorsed]: Filed Feb 5 1926 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE.

TO THE CLERK OF SAID COURT:

Sir:

An appeal in the above entitled action and also in the action entitled Fred C. Franks, et al., vs. The City of Los Angeles, et al., No. H-120-J, having been allowed, and bond therein having been filed and approved, you are requested to issue transcript of record on appeal of defendants and appellants, The City of Los Angeles, a municipal corporation, George E. Cryer, Mayor of The City of Los Angeles, and Robert Lee Heath, Chief of Police of The City of Los Angeles, in the above entitled case, containing copies of the following papers herein, viz:

1. The amended bill filed by plaintiff herein.

2. The answer to the amended complaint filed by defendants herein.

3. Order on stipulation that evidence offered in the above entitled action shall apply also to the case of Fred C. Franks, et al., vs. The City of Los Angeles, et al., No. H-120-J.

4. Statement of the evidence with approval thereof.

5. Opinion of the court directing decree in favor of the plaintiff.

6. The decree of court perpetually enjoining and restraining defendants from enforcing that certain Ordinance of The City of Los Angeles, No. 33512, and amendments thereto, filed herein and entered January 19, 1926.

7. The petition for appeal filed herein by the appellants.

8. The assignment of errors filed herein by the appellants.

9. Order allowing the appeal and fixing bond attached to said petition for appeal.

10. The bond on appeal.

11. Praecipe.

12. The original citation as required by Rule 14 of the United States Circuit Court of Appeal for the Ninth Circuit.

12½. Order enlarging time for docketing record on appeal.

13. Stipulation for consolidation on appeal of above entitled action with action entitled Fred C. Franks, et al., vs. City of Los Angeles, et al., No. H-120-J.

NOTE TO THE CLERK:

Your attention is directed to the Stipulation on file herein, for the consolidation on appeal of the above entitled action with the action entitled Fred C. Franks, et al., vs. The City of Los Angeles, et al., No. H-120-J, and you are requested, in accordance therewith, to entitle the transcript of the record in both actions; also, as per Equity Rule No. 76, you are requested to omit from all documents in which the title of court and cause appear, with the exception of the amended bill of complaint, the formal captions and to state simply "Title of Court and Cause," and eliminating all endorsements with the exception of the filing marks.

Jess E. Stephens
City Attorney
and
Lucius P. Green,
Asst. City Attorney,
Solicitors for Defendants and Appellants.

It is hereby stipulated by the Solicitors for the respective parties to the above entitled action that the foregoing Praecipe is the only one to be considered in this cause and made a part of the record and transcript.

Jess E. Stephens,
City Attorney,
and
Lucius P. Green
Asst. City Attorney,
Solicitors for Defendants and Appellants.
Overton, Lyman & Plumb
L. K. Vermille
Solicitors for Plaintiff and Appellee.

[Endorsed]: Filed Mar. 20 1926 Chas. N. Williams Clerk by L. J. Cordes, deputy clerk

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 49 pages, numbered from 1 to 49 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, amended complaint, answer to amended complaint, final decree, stipulation of consolidation, statement of evidence, opinion, assignment of errors, petition for appeal and order allowing same, and fixing bond, stipulation for costs on appeal, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, and of our Independence the One Hundred and Fiftieth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4835.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The City of Los Angeles, a municipal corporation George E. Cryer, Mayor of the City of Los Angeles, and Robert Lee Heath, Chief of Police of the City of Los Angeles,

Appellants,

vs.

United Dredging Company, a corporation,

Appellee.

APPELLANTS' BRIEF.

JESS E. STEPHENS,
City Attorney;
LUCIUS P. GREEN,
Assistant City Attorney, and
CECIL A. BORDEN,
Deputy City Attorney,
Attorneys for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 4835.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The City of Los Angeles, a municipal corporation George E. Cryer, Mayor of the City of Los Angeles, and Robert Lee Heath, Chief of Police of the City of Los Angeles,

Appellants,

vs.

United Dredging Company, a corporation,

Appellee.

APPELLANTS' BRIEF.

This is an appeal from the decree of the District Court for the Southern District of California, Southern Division, granting an injunction enjoining and restraining appellants from enforcing, as to appellee, the provisions of a certain ordinance of the City of Los Angeles, hereinafter referred to.

In accordance with the stipulation for consolidation on appeal, appearing on page 16 of the transcript of the

record, this appeal is also prosecuted from a decree of the same court rendered at the same time in a case of identical nature, entitled, "Fred Franks, *et al.*, etc. v. the City of Los Angeles, *et al.*, No. H-120-J, Equity," with which the instant case was consolidated and tried, and in which judgment was rendered upon the evidence introduced in the case at bar.

STATEMENT OF FACTS.

The facts of the controversy are as follows:

At the time this action was instituted in the lower court, in August of 1924, appellee, a corporation organized and existing under the laws of the state of Delaware, was operating steam dredges in and around Los Angeles harbor, formerly the harbor of San Pedro, in Los Angeles county, state of California, and within the corporate boundaries of the City of Los Angeles, for the purpose of deepening and widening the navigable waters of the harbor, and at said time was engaged in fulfilling contracts for certain work of this nature with the Government of the United States.

At said time, there was in effect an ordinance of the City of Los Angeles known as "No. 33,512 (New Series)", (as amended by Ordinances Nos. 38,872, 38,873, 41,463 and 47,457 (New Series)), enacted December 21, 1915, creating a board of mechanical engineers, prescribing their powers and duties, and regulating the construction, operation and inspection (among other mechanical contrivances) of steam boilers and steam generating appliances, and, further, regulating and prescribing the qualifications of persons engaged in their operation.

By the ordinance, it is made a misdemeanor for any person, firm or corporation to operate such boilers or appliances without having first submitted same to an inspection and procuring a license therefor from the board, and making it a further misdemeanor to employ or permit any person to use or operate the same, other than an engineer duly licensed as such by the board.

The appellee, in violation of the said provisions of said ordinance, operated the steam equipment of its said dredges, consisting of boilers and other steam generating apparatus, as defined by the ordinance, without submitting same to the inspection required and without procuring the prescribed license authorizing such operation, and, in additon, employed persons unlicensed by said board as operatives thereof.

For the purpose of enforcing said ordinance, appellants caused the arrest of the employees of appellee who were acting in violation thereof, and threatened further arrests if such violations continued.

As a result thereof, this action was instituted by appellee for the purpose of enjoining the enforcement of said ordinance on constitutional grounds and on the ground that the enactment of said ordinance is an unwarranted invasion by the municipality of a field of legislation over which the Federal Government has assumed complete jurisdiction.

The question presented to the lower court, which it decided adversely to appellants, and the question which the court is here called upon to determine, is whether or not dredges such as are operated by appellee in dredging operations in the Los Angeles Harbor are of

the classes of vessels which are required to be inspected and to be operated by licensed engineers by the laws of the United States Government. If they are, it must be conceded that the jurisdiction of the United States Government in this respect is exclusive, but, if not, that the City of Los Angeles may, in the exercise of its police powers, impose any valid and reasonable regulation respecting the boiler equipment on such dredges and the licensing of engineers employed thereon.

ARGUMENT.

The authority of the United States Government in relation to inspection of vessels is provided for by chapter 1, title LII of the Revised Statutes of the United States, appearing on page 852 of the second edition, and chapter 212, Sec. 10, 35, Stat. 428. Title LII deals generally with the regulation of steam vessels. As to vessels subject to United States inspection, it is there provided as follows:

> "Section 4399. Every vessel propelled, in whole or in part, by steam shall be deemed a steam vessel, within the meaning of this title."
>
> "Section 4400. All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled, in whole or in part, by steam for navigating canals, shall be subject to the provisions of this title."

Here it is clearly provided, in terms so definite as to admit of no question or doubt, what class of vessels is subject to United States inspection, viz.: "every vessel propelled, in whole or in part, by steam,"—those being the steam vessels comprehended by the succeeding section,

No. 4400, which provides that "all steam vessels, propelled, in whole or in part, by steam shall be subject to the provisions of this title." That fact, we submit, must be one of the first points of inquiry in determining the question of jurisdiction here. An inspection of the record as to whether or not the dredges operated by the appellee are within the definition of section 4399 and 4400 of the Revised Statutes, discloses no allegations of the pleadings nor evidence which indicate in any manner that such dredges are steam vessels, within the meaning of said sections, and, by reason thereof, subject, as to inspection, to the jurisdiction of the United States Government.

Other sections of chapter 1, title LII, refer in detail to the type of vessel which Congress intended to be covered by United States inspection regulations. Section 4426 provides that, "The hull and boiler of every ferry boat, canal boat, yacht, or other small craft of like character, *propelled by steam,* shall be inspected under the provisions of this title." Again, in section 4427, it is provided that, "The hull and boiler of every tug boat, towing boat and freight boat shall be inspected under the provisions of this title."

The purpose of the legislation, as indicating that it was not designed to affect a dredge of the character set forth in the complaint, is fully disclosed in the decision in the case of Hartranft v. Du Pont, 118 U. S. Rep. 226, where the court stated:

> "The Repauno was a vessel propelled by steam and navigating the Delaware River, which is a water of the United States, and a common highway of commerce. She was, therefore, by the terms of

Sec. 4400 of the Revised Statutes, made subject to the provisions of title 52. But, if there were any doubt about the application of the inspection laws to the Repauno, it would be removed by Sec. 4426. It seems to us clear that the Repauno comes within the class of boats described in this section. Of course, she bears no resemblance to a canal-boat, but she only differs from a ferry-boat, as it is generally understood, in not conveying passengers for hire; and she differs from a yacht in not being sea-going, if, in fact, she is not sea-going, and in not being designed and used for pleasure merely. But, if neither a ferry-boat nor a yacht, she clearly falls within the meaning of the phrase 'other small craft of like character.' If such a boat, so constructed and used, is not included in that phrase, it would be difficult to name any that would be. If it is argued that the Repauno is not such a craft as Congress would require to carry a licensed engineer and a licensed pilot, the reply is, that, as Sec. 4426 makes this requirement of a canal-boat propelled by steam, and subjects it to the other provisions of law for the better security of life, there is no reason why the same exactions should not be made of the boat in question.

"The reason of the law applies to the Repauno. *The purpose of title 52 is primarily the protection of the passengers and crew and property on vessels propelled by steam.* The law was passed also to protect the lives and property of persons on other boats and at the wharves. The Repauno was of sufficient size to cause peril to life and property by an explosion of her boilers. She was not a skiff. She was not a mere toy incapable of doing harm. The plaintiff's superintendent, who daily, and his workmen, who occasionally were carried back and forth upon her, and the pilot and engineer, who were re-

quired for her navigation, and the people in other boats who passed her on the water, or those who stood on the docks where she landed, were entitled to the same protection which the law provided against the explosion of the boilers of larger craft. A boat propelled by steam, which habitually carries four persons and sometimes more, and is capable of carrying twenty-five, ought to be subject to inspection. The fact that, if her boiler should explode or her hull spring a leak, probably only four lives would be imperilled, does not occur to us as ground why she should be exempted from the provisions of the law requiring inspection of vessels propelled by steam.

"In reaching this conclusion we have not overlooked the case of United States v. The Mollie, 2 Woods, 318. In that case the craft in question was of smaller dimensions than the Repauno, and was occasionally run by her owners for amusement on the Buffalo Bayou below Houston, Texas. She was held not to be within the inspection laws.

"It may be difficult to draw the line between vessels propelled by steam which are so small and insignificant that they do not come within the inspection laws, and larger boats which do. But we are clearly of opinion that the Repauno belongs to the latter class, and that the penalty sued for in this case was lawfully enforced. The judgment of the Circuit Court must, therefore, be reversed."

No Legislation by Congress Upon the Subject of Inspection of Dredgers.

While the decision of the court in the case at bar is based upon the construction of chapter 212, section 10, 35 Statutes, 428, relating to inspection of seagoing barges, and not upon the provisions of sections 4399 and 4400,

of chapter 1, title LII, *supra;* in order to disabuse the mind of this court of any impression that provision for the inspection of dredges is made by federal statutes other than that upon which the decision is based, we have entered into the foregoing discussion of sections 4399 and 4400, *supra.*

Chapter 212, section 10, 35 Stat., 428, *supra,* under which the District Court holds that the Federal Government has assumed jurisdiction over the inspection of dredges and equipment, to the exclusion of state or municipal control, reads as follows:

> "Sec. 10. That on and after January first, nineteen hundred and nine, the local inspectors of steamboats shall at least once in every year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections forty-four hundred and twenty-one and forty-four hundred and twenty-three of the Revised Statutes."

It is at once apparent from a perusal of the foregoing section that Congress in enacting it contemplated only barges designed and constructed and customarily used for traversing the open seas, such as freight barges, rock barges, oil barges, coal barges, and other barges, lighters or scows of like nature whose primary and only office is to navigate and transport cargoes across the open seas, either under their own power or in tow.

A dredge is neither designed nor constructed for such use. Her sole and only function is to excavate inland and shallow coastal waterways; not to traverse the sea, except incidental to her usual employment, or to engage in transportation or navigation, and the mere fact that she has a hull or float similar to a barge and is occasionally moved from one harbor to another, does not in any way or at all bring her within the classification of "seagoing barges."

No mariner could possibly confuse the two, or designate a dredge a seagoing barge, or a seagoing barge a dredge; and it is difficult to believe that in enacting this statute, its framers, who must have been possessed of more than ordinary knowledge of this subject, intended by the use of the descriptive noun "seagoing barge" to include dredges.

Webster defines a "barge" as

> "A roomy boat, usually flat-bottomed and used principally in harbors and on rivers and canals for the conveyance of passengers or goods, as a coal barge. It may have sails or means of self-propulsion, but is more often towed."

"Seagoing" is defined by Webster as

> "Designed or adapted for sailing the open seas in distinction from rivers or harbors; as a seagoing tug."

The same term is defined by the Standard Dictionary as

> "Adapted for use on the ocean; skillful in or accustomed to navigation on the high seas; seafaring."

A "dredge" is defined by Webster as

> "A machine for scooping up or removing earth, as in excavating or deepening stream channels, building levees, digging ditches, etc. There are three principal varieties constructed: (1) with a series of buckets on an endless chain; (2) with a pump or suction tube; (3) with a single bucket or grab at the end of an arm."

The same term is defined by reference to the language of complainants in the case of Bartlett v. Steam Dredge No. 14 (Mich.), 107 Mich. 74, 64 N. W. 951, as follows:

> "The dredge hull is virtually a large scow, with a boiler, engine, and different kinds of machinery; a crane, a boom, and a dipper. It has no means of propulsion, except by towing, nor any rudder. The dredge is used for digging material under water, and is not used for transportation. It is the same thing as a steam shovel on land. It has no master, and it is not used for transporting passengers, freight or anything."

Continuing, the court stated:

> "The sole purpose of these barges was to dig, not to navigate. They are not moved from place to place for the purpose of navigation, as are vessels engaged in commerce, nor are they intended to be used for transporting passengers or freight or the material which they bring up from the lake or river beds. * * * It certainly would be a forced construction to hold that such structures 'are used or intended to be used in navigating the waters of the state.' * * * The term 'vessel' is defined by Congress as 'including every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the

water.' A dredge is incapable of being used as a means of transportation on the water, except by removing its machinery and transforming it into something for which it was never intended to be used. Barges are vessels within the admiralty jurisdiction and subject to maritime liens. Citing: Dick Keys, 1 Biss. 408, Fed. Cas. No. 3898; Disbrow v. Walsh Bros., 36 Fed. 607.

"So, also, are lighters used in conveying lumber to vessels lying in deep water. Citing: The Lighter Case, 1 Brown Adm. 334, Fed. Cas. No. 5307."

The case of Muellerweise v. Pile Driver E. O. A., 69 Fed. 1005, was one involving a libel which was filed to recover supplies furnished at Alpena, Mich., to the pile driver E. O. A. The libel alleges that said vessel was used for commerce and navigation. The answer denied the jurisdiction of the court, and denied that said pile driver was competent to perform any voyages or trips of a nature to subject the craft to the admiralty and maritime jurisdiction of the court, and denied that the pile driver had any master during the times mentioned in the libel. The answer further pleaded that the pile driver is a platform or a float upon which is erected the ordinary derrick and appliances for the use of a pile-driving hammer, and a small stationary engine to run said hammer; that said float and appliances are not used in commerce and navigation, but are used simply for the purpose of driving piles about the docks in the harbor of Alpena and in Alpena River. The court stated:

"The character and uses of the E. O. A. are substantially as set forth in the answer. * * * This scow or floating platform upon which the pile driver

was erected was about 60 feet long, 20 feet beam, and 2½ feet deep, and, so far as its carrying capacity was concerned, was therefore of upward of five tons burden. The E. O. A. was not enrolled or licensed. The engine and boiler, the main use of which was to operate the pile hammer, were never inspected, nor was the man in charge of the craft, whose duty it was to operate the hammer, ever licensed as a master, nor did he profess to be a seaman."

Continuing, the court stated:

"It must pertain in some way to the navigation of a vessel, having carrying capacity, and employed as an instrument of travel, trade or commerce, although its form or means of propulsion are immaterial. (Citing cases.) The fact that a structure floated on the water does not make it a ship or a vessel. Citing: Cope v. Dry Dock Co., 119 U. S. 627; The Pulaski, 33 Fed. 383; The Hendrick Hudson, 3 Ben. 419, Fed. Cas. No. 6355.

"In the last case it is said: 'The fact that the structure has a shape of a vessel, or has been once used as a vessel, or could by proper appliances be again used as such, cannot affect the question. The test is the actual status of the structure as being fairly engaged in commerce and navigation.'

"It is true that the E. O. A. had carrying capacity, and was of more than 20 tons burden; but the fact remains that her only use and employment during all the time mentioned in the libel was not in commerce and navigation. * * * Since then her sole employment has been the driving of piles and building of docks. The transportation of the hammer, and, for its operation, of the portable en-

gine, and their support and floatage while in use, were the sole functions of this scow or platform. * * *

"The case of The Pioneer, 30 Fed. 206, which sustains a lien upon a dredge because it was capable of use in navigation without its machinery, although its only use was to transport the shovel and machinery with which it was equipped, is irreconcilable with the cases of The Hendrick Hudson, The Pilaski, Ruddiman v. A Scow Platform, 38 Fed. 158; The Big Jim, 61 Fed. 503."

In the case of United States v. Dunbar, 67 Fed. 783, the court said:

"This dredge boat (Tipperary Boy) was properly regarded as a manufacture or machine, and not as a vessel, inasmuch as it has no power of propelling itself, and is incapable of use save as a dredging machine."

In the case of The International, 83 Fed. 840, it was stated:

"Dredges and scows are held to be watercraft; they are intended for, and subject to, use only upon the water, and are consequently so shaped and constructed as to be navigated. That they are without independent means of propulsion is immaterial. *In this respect they resemble barges and similar vessels.*" (Italics ours.)

In the case of Commonwealth v. Breakwater Co. (Mass.), 100 N. E. 1035, the barges or lighters there involved were used for transporting stone in the construction of a breakwater at Provincetown, Mass. The barge or lighter was loaded with stone at dock in Rockport, and then was towed in as straight a course

as navigation would permit across the high seas to the harbor of Provincetown, where it was unloaded. The barge in question, "No. 43", was built at Baltimore. Her tonnage was 330 net tons. Her dimensions were, length 115 feet over all, 91 feet over bottom, and width 35 feet, with two bulkheads extending its entire length, both ends being square and shaped alike, but not vertical, and the bottom being flat. She had no sails or means of self-propulsion, nor rudder, and could progress only by being towed. She had a deck house in which were a boiler, pump, two engines, and sleeping quarters. The boiler was used for loading and unloading its cargo and weighing anchor.

In the case of The Mamie (a steam pleasure yacht), 5 Fed. Rep. 813, the question was presented whether she belonged to a class of vessels within the scope and purview of the Limited Liability Act. The Limited Liability Act of Congress was passed in 1851 and was modeled after the early English acts. The act itself extends in terms to all vessels, and contains no restrictions except such as are specified in the last section. (Revised Statutes, Sec. 4289.) This act "shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Vessels not specifically named in this exception are, *prima facie,* at least, entitled to the benefit of the act. The court undertook to define and consider the characteristics of the boats named in the exception, and upon this point said:

> "The exceptions in the act itself indicate the intention of Congress to restrict its benefits to what is generally known as maritime commerce, though

it may also happen to be commerce between the states. They are:

"First: 'Canal-boats.' These are ordinarily, though not always, used upon artificial waters, within the limits of a single state.

"Second: 'Barges' were defined by Webster, in his dictionary of 1851, the year the act was passed, (1) as 'pleasure boats, or boats of state, furnished with elegant apartments, canopies, and cushions, equipped with a band of rowers, and decked with flags and streamers, used by officers or magistrates'; and (2) 'a flat-bottomed vessel of burden for the loading and unloading of ships.' In the latter sense it was undoubtedly used by Congress, and in that sense barges are synonymous with lighters, and are used wholly in local navigation. In later years the word has been used to designate a class of large vessels, sometimes costing from $15,000 to $50,000, carrying large cargoes, and depending for their motive power wholly or in part upon steamers, to which they are attached by tow-lines, and employed to a very large extent in interstate commerce upon the lakes. Whether the owners of such barges would not be entitled to the benefits of the Limited Liability Act, is an open question. Undoubtedly they are within the letter of the exception, but as they are a class of vessels which was unknown at the time the act was passed, it would seem they are not within its spirit. I see no reason in principle why they are not as much within the act as the propellers which furnish them their motive power.

"It is possible, however, that the use of the word 'barges' in the Revised Statutes of 1873 may indicate an intention on the part of Congress to extend the exemption to this class of vessels.

"Third: 'Lighters'—a well-known class of vessels, used in assisting to load and unload other vessels."

"A barge is a flat-bottomed freight boat or lighter for harbor and inland waters."

Monongahela Coal Co. v. Hardsaw, 77 N. E. 365.

It is conceded that if the dredge in question were denuded of its dredging machinery, housing and superstructure, and were decked over, it could be converted thereby into a seagoing barge, but, until this is done, it retains the character of a dredge.

As an example, it is well known to the court that old sailing ships and steamers are often converted into seagoing barges by the same process, *viz.,* removing the masts, rigging, boilers and machinery, and equipping them with the necessary towing bits and apparatus.

For illustration, the attention of the court is directed to the numerous barges of this type in use on this coast by the various oil companies for transporting oil from port to port. Until such transformation is made, it cannot be said that merely because the vessel has a hull that could be converted into a seagoing barge, she is a "seagoing barge," or that she would thereby be relieved from the necessity of inspection or license, as prescribed by federal statute.

That the appellee, prior to the filing of this action, never considered its dredges "seagoing barges," is manifest from the fact that, according to the testimony of its own witnesses, inspection of its dredges by Government inspectors, as required by said section 10, had never been made nor requested, yet if such dredges are in fact

"seagoing barges," their operation without such inspection was and is an open violation of federal law, by which appellee knowingly subjects itself to the possibility of the imposition of severe penalties.

From the testimony of the local Government inspectors, called on behalf of appellants, appearing on pages 26, 27 and 28 of the transcript, it is apparent that such dredges are not considered, either by the Department of Commerce of the United States or by themselves, as inspectors, as falling within any of the classes of vessels required to be inspected under federal laws; and, further, that such dredges are not "seagoing barges," but are dredges.

The District Court in its opinion [Tr. p. 41] says:

"There was evidence offered to show that it is not the practice of the department charged with the duty to make inspection of vessels, to inspect barges, unless they are used directly in the work of transporting passengers or freight. But if the statute has, as I have concluded, brought dredges of the kind involved in this suit within the federal inspection field, then it matters not whether the officers charged with inspection duty in practice include or exclude such a barge from inspection."

It must be remembered that this is a matter of statutory construction. The statute involved does not, by its terms, include dredges, but is limited to seagoing barges, and for this reason the interpretation placed upon it by officers charged with its administration must be accepted by the court, unless there are very cogent reasons to the contrary.

Logan v. Davis, 233 U. S. 613.

In the foregoing case, at page 627, the court said:

> "The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States v. Moore,* 95 U. S. 760, 763; *Hastings and Dakota Railroad Co. v. Whitney,* 132 U. S. 357, 366; United States v. Alabama Great Southern Railroad Co., 142 U. S. 615, 621; Kindred v. Union Pacific Railroad Co., 225 U. S. 582, 596."

In *Jacobs v. Prichard,* 223 U. S. 200, at page 205, the court said:

> "When a statute entrusted the carrying out of its own provisions to one of the executive departments of the government, the interpretation of the statute by such department will be followed by the courts unless there are most cogent reasons to the contrary. Pritchard v. Jacobs, 46 Wash. 562, 570; United States v. Moore, 95 U. S. 760, 764; Edwards v. Darby, 12 Wheat. 206; Brown v. United States, 113 U. S. 568, 574; Louisiana v. Garfield, 211 U. S. 70, 78; Robertson v. Downing, 127 U. S. 607, 614; United States v. State Bank, 6 Peters 29, 40."

In *Louisiana v. Jack,* 244 U. S. 397, at page 406, the court said:

> "This contemporary construction of the act by the two law officers of the state charged with acting under it is persuasive authority as to its true meaning, and, upon full consideration, we think it is the correct interpretation of it."

In *First National Bank v. United States,* 206 Fed. 374, at page 379, in referring to the construction which the administrative branch of the Federal Government had placed upon a statute, said:

> "This is the interpretation of this act of Congress which was given to it by the secretary of the treasury and by the attorney general, who were charged with the duty of executing it, and it is an established rule of the national courts that the contemporaneous construction given to an act of Congress by those charged with its execution, though not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that their construction was wrong."

In *State v. Gordon,* 181 S. W. 1016, at page 1021, the Supreme Court of Missouri, in construing a legislative enactment, said:

> "* * * we could, if the above conditions presented all of the facts and showed all of the difficulties, very readily (if there were not other and additional items in dispute) and speedily settle this case by invoking the well recognized rule of statutory construction that the meaning put upon the words of these many similar appropriation acts by the executive officers of the state upon whom the duty of interpretation falls, is of great weight, and, absent other qualifying considerations, decisive (Schawacker v. McLaughlin, 139 Mo. 333, 40 S. W. 935; Darling v. Potts, 118 Mo. 506, 24 S. W. 461; Ross v. Baltimore Company, 111 Mo. 18, 19 S. W. 541; Barber Asphalt Paving Co. v. Meservey, 103 Mo. App. 186, 77 S. W. 137), especially when coupled with the passive acquiescence of the Legislature for almost forty years."

In *State v. Moore,* 69 N. W. 373, at page 378, the Supreme Court of Nebraska said:

> "We are not without the aid of a construction placed on acts similar to this by the other departments of the government. We are aware that such construction is not conclusive, but when the Legislature, in framing an act, resorts to language similar in its import to the language of other acts, which have received a practical construction by the executive departments and by the Legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier."

In *State v. Nashville Club,* 154 S. W. 1151, at page 1154, the Supreme Court of Tennessee said:

> "A construction of a statute or the Constitution, not emanating from judicial decision, but adopted by the legislative or executive departments of the state, and long accepted by the various agencies of government and the people, will usually be accepted as correct by the courts."

It is conceded that dredges are vessels as defined by federal statute, and they may, therefore, be within the admiralty jurisdiction of the United States. But this alone is insufficient to relieve them from regulations imposed by a valid exercise of the police power of the municipality within whose confines they are operating.

That municipalities have power to prescribe harbor regulations for the protection of life and property where such regulations do not conflict with any law of Congress regulating commerce, or with the general admiralty juris-

diction conferred on the courts of the United States, is indisputable.

The James Gray v. The John Fraser (Cushing v. The John Fraser), 21 How. 184;
Gulf etc. Co. v. Hefley, 158 U. S. 104;
Hemington v. Georgia, 163 U. S. 311;
U. S. v. St. Louis & M. V. T. Co., 184 U. S. 255.

The mere fact that Congress has the power to regulate all shipping, including the operation of dredges, on the navigable waters of the United States, does not mean that the United States has *exclusive* jurisdiction over such matters, and unless Congress has legislated relative thereto, either the state or the municipality within whose boundaries such waters may lie, may, in the valid exercise of its police power, prescribe such regulations as may be necessary for the protection of life and property and the convenient and economical use of the waters and wharves of the harbor.

Cooley v. Board of Wardens, 12 How. 299;
Ex parte McNiel, 13 Wall. 236;
Wilson v. McNamee, 102 U. S. 572;
Olsen v. Smith, 195 U. S. 332.

That regulations requiring boiler inspection are for the purpose of protecting life and property, and are therefore a valid and proper exercise of the police power of the municipality, cannot be disputed. In the case of dredges operating in proximity to expensive shipping and docks loaded with human life, and valuable merchandise, large numbers of persons and property of great value are affected, and it is only right and proper that

these persons and this property should be protected by appropriate regulations.

Since the Federal Government has failed to exercise its authority to regulate the operation of dredges in its harbors, it is not only the right but the duty of the City of Los Angeles to do so, and to thus protect the lives and property of its citizens.

Federal Regulation of Marine Engineers Limited to Engineers of Steam Vessels.

The learned District Court held that the City of Los Angeles may not enforce the regulations of said ordinances in requiring the licensing of engineers employed upon said dredges to operate boilers and machinery. This assertion is based upon the theory that employees of said dredges are seamen and as such are subject solely to the control of the Federal Government and are not in any manner subject to the jurisdiction of the City of Los Angeles, and that the Federal Congress has by act duly passed governed the requirements of seamen.

By the provisions of said chapter 1, title LII, it is provided, in section 4438:

> "The boards of local inspectors shall license and classify the masters, chief mates, engineers and pilots of all steam-vessels. It shall be unlawful to employ any person, or for any person to serve as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

Also, in section 4441:

"Whenever any person applies for authority to perform the duties of engineer of any steam vessel, the (inspector) (inspectors) shall examine the applicant as to his knowledge of steam machinery, and his experience as an engineer, and also the proofs which he produces in support of his claim; and if, upon full consideration, they are satisfied that his character, habits of life, knowledge, and experience in the duties of an engineer are all such as to authorize the belief that he is a suitable and safe person to be intrusted with the powers and duties of such a station, they shall grant him a license, authorizing him to be employed in such duties for the term of one year, in which they shall assign him to the appropriate class of engineers; but such license shall be suspended or revoked upon satisfactory proof of negligence, unskillfulness, intemperance, or the willful violation of any provision of this title. Whenever complaint is made against any engineer holding a license authorizing him to take charge of the boilers and machinery of any steamer, that he has, through negligence or want of skill, permitted the boilers in his charge to burn or otherwise become in bad condition, or that he has not kept his engine and machinery in good working order, it shall be the duty of the inspectors, upon satisfactory proof of such negligence or want of skill, to revoke the license of such engineer and assign him to a lower grade or class of engineers, if they find him fitted therefor."

Engineers required to be licensed are those employed upon steam vessels of the character defined by sections 4399 and 4400. Engineers employed upon other craft not comprehended by these sections are not required to

be licensed by the Government of the United States; *i. e.*, no jurisdiction in this respect can be asserted as to such engineers, and for that reason such engineers may be subjected to suitable requirements by the City of Los Angeles, which will insure the employment of those competent to have charge of steam boilers and similar equipment. It is idle to assert that if the City of Los Angeles has jurisdiction over the dredge here in question, this authority will not be limited upon the theory that those employed as engineers may escape regulation under the laws of the United States Government. Their employment is not in connection with steam vessels, and consequently they are not required to be licensed by the United States Government. The wording of the statutes referred to is so clear that it must be manifest that the Department of Commerce could have taken no other attitude than that which it has taken, as evidenced by the testimony of the inspectors hereinbefore referred to.

For the foregoing reasons, it is respectfully submitted that the ordinance of the City of Los Angeles, above referred to, is a valid exercise of the police power of the municipality and is not an invasion of any legislation enacted by the Congress of the United States, and with all deference to the learned District Court, that its decree should be reversed.

Dated this 3rd day of September, 1926.

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City Attorney;
LUCIUS P. GREEN,
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Deputy City Attorney,
Attorneys for Appellants.

No. 4835.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

3

The City of Los Angeles, a municipal corporation; George E. Cryer, Mayor of the City of Los Angeles, and Robert Lee Heath, Chief of Police of the City of Los Angeles,

Appellants.

vs.

United Dredging Company, a corporation,

Appellee.

APPELLEE'S BRIEF.

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vs.

United Dredging Company, a corporation,

Appellee.

APPELLEES' BRIEF.

STATEMENT OF FACTS.

This is an action brought by the United Dredging Company, a corporation, organized under the laws of the state of Delaware (appellee), against the City of Los Angeles, George E. Cryer, Mayor of said City, and Robert L. Heath, Chief of Police of said City (appellants), to restrain appellants from enforcing an ordinance of the City of Los Angeles. The evidence

before the District Court shows that appellee at the time this action was instituted was engaged in the dredging business operating dredges together with its equipment in the navigable waters along the coast of the United States, under contracts with the United States Government. That among its various operations, appellee was engaged in dredging in the harbor of Los Angeles, California, and in connection with said dredging operations was using a seagoing barge equipped with certain steam boilers and other facilities for dredging. That said seagoing barge, when equipped with facilities for dredging, is a dredge. That in the operation of said dredge it is necessary to employ certain persons to operate the boilers upon said dredge. That there is a city ordinance of the City of Los Angeles, being Ordinance No. 33512, New Series, as amended [Tr. pp. 30-36], which, among other things, requires generally all persons using steam boilers carrying over ten (10) pounds of steam to employ an engineer licensed by the Board of Mechanical Engineers of said City and that such steam boilers shall be inspected at certain designated periods; by such ordinance, it is made a misdemeanor for any person to operate such boilers without having been first duly licensed by the said Board of Mechanical Engineers and making it a further misdemeanor for any person, firm or corporation to operate any such boilers or appliances until same are inspected by said Board of said City.

That appellants caused the arrest of appellee's men operating the boilers on said dredge while dredging the navigable waters of Los Angeles Harbor. The only

question to be determined by this court is whether or not, from the above facts, the City of Los Angeles can enforce its said ordinance against appellee.

Appellants make the following statement at the beginning of their brief, pages 5-6:

"The question presented to the lower court which is decided adversely to appellants and the question which the court is here called upon to determine, is whether or not dredges such as are operated by appellee in dredging operations in the Los Angeles Harbor are of the classes of vessels which are required to be inspected and to be operated by licensed engineers by laws of the United States Government. If they are, it must be conceded that the jurisdiction of the United States Government in this respect is exclusive * * *."

With this concession in mind, we will not take up the time of the court upon this point, but will direct our argument to show that Congress has acted so as to exclude action by the City. However, we wish to point out that as to the requirement of the City that an engineer upon a dredge be licensed, we do not believe that it is necessary for any affirmative act upon the part of Congress, as such engineers are under the jurisdiction of the Federal Government as conferred by the Admiralty provision of the Constitution without affirmative act of Congress.

ARGUMENT.

Appellee devotes some eighteen pages of its brief in an attempt to prove that a dredge is not a "seagoing barge" within the meaning of chapter 212, section 10, 35 Statutes at Large, 428, and two pages and a half

in an attempt to prove that it is within the power of the City to require an engineer of a dredge to be licensed by the City.

The appellants also attempt to bring in sections 4399 *et seq.,* Rev. Stat., in both arguments, though such sections have no application and appellants so concede as to their first point—appellants' brief, page 9. There is no argument, but that a dredge is not a steam vessel within the meaning of the above sections. However, appellee contends that a dredge is a vessel and that as such, the engineers thereon are seamen, and that Congress has fully covered the ground as to seamen. That further, a dredge is a seagoing barge within the meaning of chapter 212, section 10, 35 Statutes 428. In our presentation we will reverse the order of argument adopted by the appellants and will first take up the question of the right of the City to regulate engineers upon the dredges, and secondly, the right of the City to require an inspection of boilers upon such dredges.

I.

A Dredge Is a Vessel Within the Meaning of the Federal Constitution and Statutes.

Section 4612 of the Revised Statutes, 9 Fed. Stat. Ann. (2nd Ed.) 230, under the title of "Seamen" defines a vessel as follows:

> "The term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable."

Section 3 of the Revised Statutes, 9 Fed. Stat. Ann. (2nd Ed.) 391, defines a vessel as follows:

> "The word 'vessel' includes every description of water-craft or other artificial contrivances used, or capable of being used, as a means of transportation on water."

"To hold that a dredge is a vessel subject to admiralty jurisdiction is in accordance with the weight of authority. McMaster v. One Dredge (D. C.), 95 Fed. 832; Bowers Hydraulic D. Co. v. Federal Contracting Co. (D. C.), 148 Fed. 290, affirmed in 153 Fed. 870, 83 C. C. A. 52; The Mackinaw, 165 Fed. 351; North American Dredging Co. v. Pacific Mail S. S. Co., 185 Fed. 698, 107 C. C. A. 620; The Steam Dredge No. 6 (D. C.), 222 Fed. 576; The Bart Tully, 251 Fed. 856, 164 C. C. A. 72."

Hooff v. Pacific American Fisheries (C. C. A.), 279 Fed. 367-368.

"The dredge, as well as each of the scows, must, in our judgment, be regarded, for the purposes of this case, as a 'vessel' within the meaning of section 3 of the Revised Statutes of the United States, and, as such, not subject to duty under the Tariff Act, of 1894. That section provides that 'the word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' The terms of this provision are broad and unqualified. The word 'transportation' is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. A pleasure yacht or an ice boat is a vessel within the meaning of this section, equally with a merchantman or an ocean liner; although the ice boat be designed solely to keep navi-

gation open, and the pleasure yacht may carry neither passenger nor merchandise for hire. While the dredge was not intended or adapted for the carriage of merchandise or passengers, and did not possess the power of self-propulsion except to an inadequate extent through the use of its steam shovel or dipper as a paddle, it was nevertheless a water craft 'used, or capable of being used, as a means of transportation on water.' Its permanent home was on navigable water, and it was intended and adapted for navigation and transportation by water of its crew, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstructions from channels and harbors in aid of navigation and commerce. Admirty jurisdiction attaches to such dredges. Within the sphere of their activities they are subject to the maritime law of contracts and of torts and to the laws of navigation."

The International (C. C. A.), 89 Fed. 484.

In the case of Ellis v. United States, 51 L. Ed. 1047, the Supreme Court of the United States, in holding that dredges are vessels, at page 1047, says:

"The scows and floating dredges were vessels."

Counsel seems to be under the impression that a dredge is not a vessel and devotes several pages of his brief to an attempt to establish this, citing the following cases:

Bartlett v. Steam Dredge No. 14, 107 Mich. 74, 64 N. W. 951;

Muellerweise v. Pile Driver, E. O. A., 69 Fed. 1005;

United States v. Dunbar, 67 Fed. 783.

In Bartlett v. Steam Dredge, cited by counsel *supra*, the state court, in construing the state lien law against a vessel, say, at page 952:

> "Whatever may be the rule in the federal courts, we cannot construe the watercraft law of Michigan to include a dredge."

This case has no application where Federal law is concerned.

In an effort not to make this brief too voluminous, we will merely quote from a few cases which refuse to follow appellants' cases *(supra)* and show how clear the decisions are that a dredge is a vessel and also the fallacy of appellants' contention that a dredge is not a vessel.

In the case of Charles Barnes Co. v. One Dredge, 169 Fed. 895, at pages 899-900, the court said, in referring to the case of Muellerweise v. Pile Driver, E. O. A. (cited by counsel, *supra*):

> "The structure involved in the Pile Driver, E. O. A. case was a floating platform which carried a derrick engine and pile-driving apparatus and was furnished with a wheel by which to propel itself about the bay or harbor. It was held not to be a vessel. *It seems to me that this decision is unsound.* It is indirect conflict as to principle involved with the dredge-boat cases. Judge Swan recognized this in distinguishing The Alabama cases, *supra*, because the dredge was accompanied by scows, and in holding that The Pioneer case, where the dredge was not so accompanied, was incorrectly decided.
>
> "In conflict with this decision is the case of Lawrence v. Flatboat (D. C.), 84 Fed. 200, affirmed on

appeal by the Circuit Court of Appeals of the Fifth Circuit in the case of Southern Log & Cart Supply Co. v. Lawrence, 86 Fed. 908, 30 C. C. A. 480, where it was held that a flatboat with a pile driver and its engine erected thereon, mainly used in constructing bulkheads for the erection of channel lights, which also transported material used in the work and was towed by a tug, was a vessel.

"I therefore conclude that a navigable structure intended for the transportation of a permanent cargo that has to be towed in order to navigate is a 'vessel', and that admiralty has jurisdiction of claims against and liens upon such a structure." (Italics ours.)

With reference to the case of United States v. Dunbar, 67 Fed. 783 (cited by counsel *supra*), the court says in The International, 83 Fed. 840:

"The immaterial statement in the opinion (referring to counsel's citation) that it was properly entered as an article of foreign manufacture, that it was not a vessel, *is entitled to no weight;* and the fact that the statement is predicated on the circumstance that the dredge was without independent 'means of propulsion' demonstrates its fallacy." (Italics ours.)

If appellee is correct in its argument to this point, a dredge is therefore a vessel within the meaning of the Federal Constitution and statutes. It, therefore, remains to be seen whether the courts have held that the men employed on dredges are seamen. On this point, there can be no question.

> "A steam dredge, without motive power, engaged in deepening navigable waters, and capable of being towed from place to place, is a 'vessel', in the meaning of Rev. St. Sec. 3, and is within the admiralty jurisdiction. Consequently, the persons employed on her and on her scows in such work are 'seamen', in the meaning of Rev. St. Sec. 4612, and entitled to a maritime lien for their services."
>
> Saylor v. Taylor (C. C. A.), 77 Fed. 476 (quoting from the syllabus).

We consider the case of Ellis v. United States, 51 L. Ed. 1047-1054, conclusive in this matter. In this case, certain dredging companies were engaged in dredging a channel in Boston Harbor under contract with the United States Government, and in connection with such dredging, employed captains, mates, engineers, firemen, crane men and deck hands on board the dredges.

The dredging companies were found guilty of employing their men on said dredges for more than eight hours in any one calendar day in violation of the Act of August 1, 1892, Chap. 352, 27 Stat. at L. 340, "Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia."

The Supreme Court was called upon to decide the effect of said act on the dredging companies who admitted employment of men on their dredges more than eight hours a day. The court says, at page 1054:

> "The words 'laborers and mechanics' are admitted not to apply to seamen as that name commonly is

used. Therefore it was contended but faintly that the masters of the tugs could not be employed more than eight hours. But the argument does not stop with masters of the tugs, or even with mates, *engineers*, and firemen of the same. Wilson v. The Ohio, Gilpin, 505 Fed. Cas. No. 17, 825; Holt v. Cummings, 102 Pa. 212, 48 Am. Rep. 199. The scows and the floating dredges were vessels. Rev. Stat. Sec. 3, 4612, U. S. Comp. Stat. 1901, pp. 4, 3120. They were within the admiralty jurisdiction of the United States. The Robert W. Parsons (Perry v. Haines), 191 U. S. 17, 48 L. Ed. 73, 24 Sup. Ct. Rep. 8. A number of cases as to dredges in the circuit and district courts are referred to in Bowers Hydraulic Dredging Co. v. Federal Contracting Co., 148 Fed. 290. Therefore all of the hands mentioned in the information were seamen within the definition in an earlier statute of the United States. Rev. Stat. Sec. 4612. Saylor v. Taylor, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476. See also Act of March 3, 1875, Chap. 156, Sec. 3, 18 Stat. at L. 485, U. S. Comp. Stat. 1901, p. 3324; Bean v. Stupart, 1 Doubl. K. B. 11; Disbrow v. The Walsh Brothers, 35 Fed. 607. They all require something of the training and are liable to be called upon for more or less of the services required of ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in less degree, to them. Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an *engineer* or coal shoveler on board ship. Without further elaboration of details we are of opinion that the persons employed by the two defendant companies were not laborers or mechanics, and were

not employed upon any of the public works of the United States within the meaning of the act." (Italics ours.)

Congress has definitely and fully legislated as to the qualifications of seamen under what is known as the La Follette Act, or Seamen's Act, and there is therefore no longer any room for regulation by the state or municipal authorities.

The La Follette Act or Seaman's Act is found in 38 Stat. at Large 1164. It is impossible to quote this act at length for it covers seven pages of the Stat. at Large and covers every conceivable subject with reference to the qualifications, wages, discharge and similar subjects involving seamen. Section 13 of the Act, entitled: Crew—Qualifications—Penalties, provides as follows:

> * * * "Every person shall be rated an able seaman, and qualified for service as such on the seas, who is nineteen years of age or upward, and has had at least three years' service on deck at sea or on the Great Lakes, on a vessel or vessels to which this section applies, including decked fishing vessels, naval vessels or coast guard vessels; and every person shall be rated an able seaman, and qualified to serve as such on the Great Lakes and on the smaller lakes, bays or sounds, who is nineteen years of age or upward and has had at least eighteen months' service on deck at sea or on the Great Lakes or on the smaller lakes, bays, or sounds, on a vessel or vessels to which this section applies, including decked fishing vessels, naval vessels, or coast guard vessels; and graduates of school ships approved by and conducted under rules pre-

scribed by the Secretary of Commerce may be rated able seamen after twelve months' service at sea: *Provided,* That upon examination, under rules prescribed by the Department of Commerce as to eyesight, hearing and physical condition, such persons or graduates are found to be competent: *Provided further,* That upon examination, under rules prescribed by the Department of Commerce as to eyesight, hearing, physical condition, and knowledge of the duties of seamanship, a person found competent may be rated as able seaman after having served on deck twelve months at sea, or on the Great Lakes; but seamen examined and rated able seamen under this proviso shall not in any case compose more than one-fourth of the number of able seamen required by this section to be shipped or employed upon any vessel.

"Any person may make application to any board of local inspectors for a certificate of service as able seaman, and upon proof being made to said board by affidavit and examination, under rules approved by the Secretary of Commerce, showing the nationality and age of the applicant and the vessel or vessels on which he has had service and that he is entitled to such certificate under the provisions of this section, the board of local inspectors shall issue to said applicant a certificate of service, which shall be retained by him and be accepted as *prima facie* evidence of his rating as an able seaman." * * *

From the minute detail with which the act covers every question involving seamen there can be no question but that the Federal Congress has taken to itself the full control thereof. Nothing that we can say can add to what was said in Prigg v. The Commonwealth of Pennsylvania, 16 Peters 618, 10 L. Ed. 1060, at 1090:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be said that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. *Its silence as to what it does not do is an expression of what its intention is as to the direct provisions made by it.*" (Italics are ours.)

Indeed, argument upon this phase of the case has been largely foreclosed by the so-called "workmen's compensation cases" involving seamen on vessels, and it has been universally held that seamen are not subject to the State Workingmen's Compensation Laws.

In Benedict's Admiralty, 5th Ed., Vol. I, page 40, we find the following:

> "Seamen cannot constitutionally be subjected, even by consent of Congress, to the Workmen's Compensation Statutes of the states."

In the case of Knickerbocker Ice Co. v. Stewart, 64 L. Ed. 834, where an attempt was made to apply the New York Workingmen's Compensation Law to a bargeman who was drowned while working on such barge in navigable waters, the Supreme Court, in holding the Workingmen's Compensation Law inapplicable, at page 839, says:

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or juricial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

"Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that

would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 574, 575, 22 L. Ed. 654, 661, 662. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts."

And again at page 840-41, says:

"Having regard to all these things we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by Southern P. Co. v. Jensen, it sought to authorize and sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

"And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal government; to relieve martime commerce from unnecessary burdens and disadvantages incident to discordant

legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—it would defeat the very purpose of the grant. * * *

"Here, we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In the case of Zurich Co. Ltd. v. Industrial Acc. Comm., 191 Cal. 770, the Supreme Court of the state of California, following the Knickerbocker case *(infra)*

and numerous other United States Supreme Court cases, held that a dredger deck-hand and launch operator, whose work was performed mainly upon a dredger operating on navigable waters, was not subject to the California Workmen's Compensation Act, and that Congress exceeded its constitutional power when it attempted to permit the application of the Workmen's Compensation Law to injuries received within the admiralty and maritime jurisdiction as it would virtually destroy the harmony and uniformity which the Constitution not only contemplated but actually established.

See, also:

Southern Pacific Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086.

II.

We will next direct our argument to the first point argued by appellant, namely, is a dredge a seagoing barge?

As already pointed out, appellee is not contending that a dredge is propelled by steam, and, therefore, section 4399 *et seq.* of the Revised Statutes are inapplicable. What we are contending is that a dredge is a "seagoing barge" within the meaning of Chapter 212, Sec. 10, 35 Stat. at Large, 428, providing as follows:

> "Sec. 10. (Seagoing barges—annual inspection—certificates.) That on and after January first, nineteen hundred and nine, the local inspector of steamboats shall at least once in every year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy them-

selves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections forty-four hundred and twenty-one and forty-four hundred and twenty-three of the Revised Statutes."

In other words, that as to this branch of the case, a dredge being a vessel, is within the protection of the Commerce clause of the Federal Constitution, and the City is going beyond its authority to require an inspection of the steam boilers thereon.

As we have already pointed out, a dredge is a vessel and, therefore, subject to regulation by Congress as an aid to commerce and navigation.

The International *(supra)*;
Charles Barnes Co. v. One Dredge *(supra)*.

III.

The Dredge Is a Sea-Going Barge.

Counsel intimates that no one with the slightest knowledge of such craft could possibly say that the dredge is a seagoing barge, yet they failed to introduce any testimony on the subject by anyone familiar with dredges to contradict the positive testimony given by experts and marine surveyors that these dredges are seagoing barges.

Mr. Andrew Young testified as follows [Tr. p. 24]:

"My duties as marine surveyor is to make surveys on the different vessels for the purpose of insuring them prior to their going to sea. I am familiar with the dredges 'Seattle' and 'San Francisco'. I have been on both of them and looked them over. They are heavily constructed for sea going. The dredges are constructed with heavy timber and braces fore and aft and bulk-heading. I would call the dredge 'Seattle' a barge. It is able to go to sea and I would recommend insurance on her to go on the high seas."

Defendants' witnesses testified that they were not familiar with the construction of these dredges and had never been on board any of them.

We find the following quotation in the case of The Nethersdale, 15 Canadian Law Journal, New Series, 268 269:

> "A dredger is a sort of open barge used in removing sand, silt, etc., from the beds of harbors, rivers and canals."

IV.

The Dredge Is Sea-Going.

The case of Commonwealth v. Breakwater, 100 N. E. 1035, at page 1037, defines seagoing as follows:

> "The point of difficulty is whether it was 'sea-going'. No exact definition of this word has been given. In this connection we think it means a barge, which from its design and construction with fair reason, in the light of all the history of ocean-going vessels, may be expected to encounter and ride out the ordinary perils of the sea, and which in fact

> does go to sea. If the vessel is not designed upon such a plan or constructed of such materials or with such skill as to warrant a reasonable belief that she is staunch enough to venture upon the high seas, the mere fact that by selecting smooth water and fair weather she is able upon occasion to go there without mishap would not warrant the description of seagoing. But want of means of self-propulsion is not a conclusive test. She may still be seagoing if she is adapted to go by tow, and does so go upon the high seas."

The definition of "seagoing" in the Century Dictionary is:

> "Seagoing—Designed or fit for going to sea, as a vessel."

In view of the abundant uncontradicted testimony introduced at the trial by plaintiff, showing that the dredges had been repeatedly on the high seas, encountered and rode out the ordinary perils of the sea, and in one instance a severe gale [Tr. pp. 21-22], and that they are sturdily built for the purposes of going to sea [Tr. pp. 22 to 26], we think it is firmly established that the dredges are seagoing.

V.

The Dredge Is Engaged in Transportation and Navigation.

Counsel for appellants, without citing authorities, states that a dredge is not engaged in transportation or navigation because it is not designed nor constructed for the transportation of cargo. Appellant's brief, page 11. The cases hold otherwise.

In the case of Charles Barnes Co. v. One Dredge Boat, 169 Fed. 895, the court at page 897 said:

> "Must, then, the transportation which the navigable structure is intended to effect be something that is temporarily aboard in order that the structure may be held to be a vessel? Or is a navigable structure that is intended to be used in transporting something that is permanently aboard of it a vessel? I see no reason in principle why the length of time the thing is to be aboard the structure and transported by it should have any bearing on the question whether it is or not a vessel. It has therefore been held in a number of cases that a steam dredge is a vessel. Such structure transports, and is intended to transport permanently, the shovel and the steam outfit with which it does its work. It is true that it transports temporarily the crew that operates it and the coal from which the steam is generated; but the ground upon which it has been held to be a vessel is not because of such temporary transportation. It has been so held in the following cases, to-wit:
>
> The Alabama (D.C.), 19 Fed. 544; The Alabama (C. C.), 22 Fed. 499; The Pioneer (D. C.), 30 Fed. 206; Aitcheson v. Endless Chain Dredge (D. C.), 40 Fed. 253; The Atlantic (D. C.), 53 Fed. 609; The Starbuch (D. C.), 61 Fed. 502; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343; The International (D. C.), 83 Fed. 840; McRae v. Bowers Dredging Co. (C. C.), 86 Fed. 344; Bowers Hydraulic Dredging Co. v. Federal Contracting Co. (D. C.), 148 Fed. 290." * * *
>
> "I therefore conclude that a navigable structure intended for the transportation of a permanent

cargo that has to be towed in order to navigate is a 'vessel', and that admiralty has jurisdiction of claims against and liens upon such structure."

The Circuit Court of Appeals in the case of The International, 89 Fed. 484, at page 485, say:

"While the dredge was not intended or adapted for the carriage of merchandise or passengers, and did not possess the power of self-propulsion except to an inadequate extent through the use of its steam shovel or dipper as a paddle, it was nevertheless a water craft 'used, or capable of being used, as a means of transportation on water.' Its permanent home was on navigable water, and *it was intended and adapted for navigation and transportation,* by water of its crew, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstructions from channels and harbors in aid of navigation and commerce." (Italics ours.)

VI.

Up to this point, if we have proven our contentions are correct, engineers upon dredges are seamen and so, under both the admiralty clause and the commerce clause of the Constitution, are not subject to regulation by the City. This seems too clear to us for further argument. But the City, while more or less tacitly admitting this by weak argument makes a great point that dredges are not seagoing barges and so the boilers are subject to inspection by the City. In support of this argument the City advances the point that the Department of Commerce has not taken jurisdiction of the inspection of boilers on the dredges and that such

a construction is entitled to great weight. This argument is undoubtedly sound up to a certain point, but must fall before another principle of law, namely, that a statute must be given such a construction as to make it workable and logical if possible.

When the language of a statute fairly permits, a construction which will lead to an unreasonable result should be avoided.

25 R. C. L. 1018.

It is a familiar principle that rules of strict and liberal construction may be departed from in order that absurd results may be avoided and to the end that a statute shall be effective for the purposes intended.

Sweetser v. Emerson (Circuit Court of Appeals), 236 Fed. 163;

The New Lamp Chimney Company v. Ansonia Brass and Copper Company, 23 L. Ed. 336.

Now as pointed out above, we think that there can be no question but that the crew of a dredge are seamen and are not subject to regulation by the City whether under the guise of inspection of engineers or otherwise. Then it is to be presumed that Congress intended to stop there and permit the boilers which such engineers operate to be inspected by the City. Clearly not. Such anomalous situations would lead to conflicts between the two authorities, the Federal Government being in control of the engineers who operate the boilers on the dredges while the City would control the boilers. That such a construction is to be avoided if possible is a cardinal rule of statutory construction.

VII.

There is, moreover, a final point which points to the same conclusion. As we have already stated, it seems to us too clear for argument that the crew of a dredge engaged in dredging in navigable waters are not subject to regulation by the City. But the regulation of the engineers on the dredge and the boilers is governed by the same ordinance. Very clearly, the regulation of an engineer and the boilers he tends is intended, and rightly so, to be part of an entire scheme for the inspection and licensing of steam plants and the operators. There is no indication that if the City Council had known that one part of such an ordinance was unconstitutional they would have passed the balance. Indeed, the logic of the situation is all against such a course. The ordinance is clearly one entire inseparable piece of legislation. Therefore, if one part is unconstitutional, the entire ordinance is unconstitutional.

Where a statute is unconstitutional in one part which is inseparable from the rest the whole is unconstitutional.

Hill v. Wallace, 159 U. S. 44; 66 L. Ed. 822;
Dorchy v. Kansas, 264 U. S. 286; 68 L. Ed. 686.

If the objectionable portions of an act are so connected with the rest of the act as to be inseparable therefrom or to render the act inoperative as a complete legislative enactment in the event the objectionable portions be excluded the entire act must fall.

Bacon Service Corporation v. Huss, 72 Cal. Dec. 50.

This being so, if the City has no authority to regulate and license engineers of a dredge operating in navigable waters and the ordinance is unconstitutional in that respect, the entire ordinance must fall and be unenforceable.

Conclusion.

In view of the uncontradicted testimony introduced in evidence that these dredges are seagoing barges, coupled with the established law that all engineers employed on the dredges are seamen, and that the United States Government has sole jurisdiction over seamen under the admiralty provision of the Federal Constitution, leads to but one conclusion, namely, that the Federal Government has complete jurisdiction and that there is, therefore, nothing left which the municipal authorities may, with propriety, regulate with reference thereto. The effect of this conclusion is strengthened by the fact that to permit the appellants to do what it is attempting to do would render every vessel entering the Harbor of Los Angeles subject to the annoyance of being inspected by appellants' Board of Mechanical Engineers, in compelling it to have its seamen and boilers licensed by appellants. If the City of Los Angeles can do this, every municipality where the vessel may stop will do likewise. The burden thus entailed on commerce would render the operation of vessels between various points in the United States practically impossible. A construction of the law rendering such a state of fact permissible is of course to be avoided.

Honorable William P. James, District Judge before whom the case at bar was tried in the District Court, said in his opinion [Tr. p. 40]: "A dredge of the kind and character here involved, employed in its work of aiding navigation, enlarging and deepening harbors and waterways, is subject to continual change of location. Its work may place it within the corporate limits of one municipality one day and some other on the next, in endless rotation. It would be a substantial interference with its operation if the men employed to manage the mechanical equipment were called upon to meet different qualification requirements of the various local governments."

From a reading of the ordinance in question, we have no doubt that the Council of the City of Los Angeles had no intention whatsoever of attempting the regulation of seamen and boilers on vessels, but that such a construction of the law is but an afterthought of some administrative officer. We, therefore, respectfully submit that the decree of the District Court be affirmed.

Eugene Overton,
E. D. Lyman,
P. B. Plumb,
L. K. Vermille,
Geo. W. Prince, Jr.,
Attorneys for Appellee.

No. 1833

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California,
Plaintiff in Error,

vs.

EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an Individual,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California,
Plaintiff in Error,

vs.

EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an Individual,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiff in Error:

SAMUEL W. McNABB, Esq., United States Attorney; DONALD ARMSTRONG, Esq., Assistant United States Attorney, Federal Building, Los Angeles, California.

For Defendants in Error:

CLAUDE I. PARKER, Esq., RALPH W. SMITH, Esq., 808 Hellman Bank Building, Los Angeles, California.

United States of America, ss.

To EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 14th day of April, A. D. 19....., pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause wherein you are Defendants in error, and JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, is Plaintiff in Error, and you are hereby required to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward J. Henning, United States District Judge for the Southern District of California, this 16th day of March A. D. 1926, and of the Independence of the United States, the one hundred and fiftieth year.

Edward J. Henning,

U. S. District Judge for the Southern District of California.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit Edith Ames English, Executrix of the Estate of Annie B. Ames, deceased, and Edith Ames English as an individual, Plaintiffs, and Defendants in Error, vs. John P. Carter, Formerly United States Collector of Internal Revenue, Sixth District of California Defendant and Plaintiff in Error. Citation Receipt of Copy admitted this 18th day of March, 1926 Claude I Parker Ralph W. Smith Atty for Defendants Filed Mar 20 1926 Chas. N. Williams, Clerk, By L J Cordes Deputy Clerk.

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs, vs. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant, a manifest error hath happened, to the great damage of the said John P. Carter, Defendant, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 14th day of April next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM HOWARD TAFT, Chief Justice of the United States, this 16th day of March in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the United States the one hundred and fiftieth year.

(Seal) Chas. N Williams
Clerk of the District Cout of the United States of America, in and for the Southern District of California.

Edward J. Henning
Judge.

By R S Zimmerman,
Deputy Clerk.

The above writ of error is hereby allowed.

I hereby certify that a copy of the within Writ of Error was on the 16th day of March, 1926, lodged in the office of the Clerk of the said United States Dis-

trict Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas N Williams
Clerk of the District Court of the United States for the Southern District of California.
By R S Zimmerman
Deputy Clerk.

[Endorsed]: 2044 J United States Circuit Court of Appeals for the Ninth Circuit John P. Carter, Plaintiff in Error vs. Edith Ames English, et al., Defendants in Error Writ of Error Filed Mar 16 1926 Chas. N. Williams Clerk By R S Zimmerman Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs, VS. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.	)	No. 2044-H COMPLAINT (IN LAW)

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes the plaintiffs and complains of the defendant and for cause of action alleges:

I.

That the plaintiffs are now and during all the times herein mentioned were citizens of the State of California and residents of the City of Pasadena in said State.

II.

That on or about the 1st day of September, 1913, the defendant, JOHN P. CARTER, was duly appointed United States Collector of Internal Revenue for the Sixth District of California and at all times since that date was, until the 22nd day of March, 1922, the duly appointed, qualified and acting Collector of Internal Revenue for said district and was during all of said times, and still is a resident and inhabitant of the City of Los Angeles, County of Los Angeles, State of California and of the said Sixth District of California.

III.

That one Annie B. Ames died a citizen of the State of California, testate, in the County of Los Angeles, State of California, a resident of said County and State, on the 15th day of May 1918, and thereafter Letters Testamentary were duly issued by the Superior Court of the State of California, in and for the County of Los Angeles, to Edith Ames English as the Executrix of the Last Will and Testament of said Annie B. Ames, deceased, on the 4th day of June, 1918, and the said Edith Ames English is now and ever since said time has been the duly appointed, qualified and acting executrix of the Last Will and

Testament of said Annie B. Ames deceased, having never defaulted or been discharged.

IV.

That said Edith Ames English, as executrix, and Edith Ames English as an individual as aforesaid, duly filed on the 9th day of May, 1919, with the Collector of Internal Revenue of the United States for the Sixth District of California, Federal Estate Tax Return, Form 706, according to the provisions of law in that regard and the Regulations of the Secretary of the Treasury, established in pursuance thereof. That at the time of filing said Return said plaintiff made no payment of tax to the Collector of Internal Revenue, Sixth District of California, by reason of the fact that the net estate, as returned, indicated no tax liability. Thereafter, however, on the 11th day of February, 1921 ,the Commissioner of Internal Revenue in and for the United States of America, in writing did inform said plaintiffs that the total Federal Estate Tax liability on the said estate was $7,450.67.

V.

Said Return for Federal Estate Tax, made as aforesaid by the said Executrix, did not include, for tax purposes in the assets or estate of the said Annie B. Ames, deceased, certain property which had been received by said decedent Annie B. Ames, and the Edith Ames English, as joint tenants and to the survivors thereof, by reason of a bequest in the Last Will and Testament of Charles L. Ames, who died a resident of the County of Los Angeles, State of California on the 24th day of February, 1915. All of the said

property set forth in the Return, being Form 706, was so received by plaintiff, Edith Ames English and Annie B. Ames, deceased, by reason of the will of said Charles L. Ames, deceased, as aforesaid, all of which property was distributed by a decree of Final distribution by the Superior Court of the County of Los Angeles, State of California, in accordance with the terms and provisions of said Will to the said Edith Ames English and Annie B. Ames, deceased, as joint tenants and to the survivor of them, as aforesaid, on the 24th day of February, 1916; All of the said property so received in joint tenancy under the Will of the said Charles L. Ames, deceased, by the said Edith Ames English and Annie B. Ames, deceased, and the circumstances of their receiving title was as required by the regulations of the Secretary of the Treasury, listed under Schedule "D" of said Federal Estate Tax Return, Form 706, but the value of said property so held in joint tenancy was not extended for inclusion in the gross estate because no property or estate was transferred upon the death of Annie B. Ames, deceased, to Edith Ames English, and the said Edith Ames English, plaintiff, received no additional estate upon the death of the said Annie B. Ames, deceased, and no tax is properly chargeable because of the death of the said Annie B. Ames.

VI.

Thereafter on the 11th day of February, 1921, over the protest of the plaintiffs herein, and contrary to the provisions of the Constitution of the United States

and of Title IV of the Revenue Act of 1917, the said Commissioner of Internal Revenue added one-half of all of the property so held by decedent in joint tenancy, to-wit, of the value of $220,330.38, to the gross taxable estate; the said Commissioner of Internal Revenue determining that the Federal Estate Tax Act, effective Oct. 4, 1917, was retroactive, and therefore covered property, or an interest which had vested prior to the enactment, and in accordance with said findings, the said Commissioner of Internal Revenue thereby increased illegally the gross estate in the sum of $220,330.38 over the value returned by the said plaintiffs and thereupon assessed an additional Federal Estate Tax, chargeable to plaintiffs as surviving tenant, in the sum of $7,450.00. That on the 10th day of March, 1921, the plaintiffs paid to the said defendant, as Collector of Internal Revenue, Sixth District of California, the said sum of $7,450.67; that thereafter, on the 27th day of April, 1921, plaintiffs duly filed with the defendant for transmittal to the said Commissioner of Internal Revenue, a Claim for Refund for the refundment of the said sum of $7,450.67 heretofore paid, which Claim for Refund, was, thereafter, on the 19th day of August, 1921, duly allowed by the Honorable Commissioner of Internal Revenue in the sum of $1,263.60 and rejected in the sum of $6,187.07. That the transfer of the said joint tenancy estate under the Will of the said Charles L. Ames, who died February 24th, 1915, to the said Edith Ames

English and Annie B. Ames, deceased, created in them at that time an absolute vesting and complete title in joint tenancy and to the survivor thereof and to their heirs, of all the right, title and interest of the said Charles L. Ames, deceased, in and to said property, and that on the 15th day of May, 1918, upon the death of the said Annie B. Ames, the said Edith Ames English received no other additional interest or estate in the said joint tenancy properties and, therefore, there was no transfer of property made upon the death of the said Annie B. Ames, deceased within the provisions of the Revenue Act of 1917, and the said property is not subject to the said Federal Estate Tax Act.

VII.

The Revenue Act of 1917, insofar as it attempts to tax the property jointly held by the said Annie B. Ames and Edith Ames English upon the death of the said Charles L. Ames, deceased, is in violation of the Constitution of the United States in that it would take property of the plaintiffs without due process of law in violation of the Fifth Amendment. Further, a tax on the said joint tenancy property would not be a transfer tax or an indirect tax but would be a direct tax thereon in violation of Art. 1, Section IX, Subdivision IV of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided and not apportioned among the several states. That the said Revenue Act would then be retroactive and therefore place a tax upon

property vesting before its enactment which, to that extent, would be in direct conflict with the provisions of the Constitution of the United States. That the plaintiffs are the owners of the claim for return of tax upon which this suit is brought, which by virtue of the acts of the defendant has been erroneously, wrongfully, and illegally assessed, demanded, collected and retained, and the plaintiffs have been erroneously, wrongfully and illegally required to pay the sum of $6,187.07 tax pursuant to said assessment, under duress and under a specific protest as aforesaid, and the said plaintiffs are now entitled to a refund of the said $6,187.07, so paid as aforesaid, together with interest thereon from the 10th day of March, 1921, at the rate of six per centum per annum, as provided in Section 1019 of the Federal Revenue Act of 1924.

VIII.

No other action has been had on said claim in Congress or by any Department and no person other than plaintiffs are the owners thereof or interested therein; no assignment or transfer of said claim or any part thereof or interest therein has been made by plaintiffs or either of them. The plaintiffs are, therefore, justly entitled to the amount herein claimed from the defendant after allowing all just credits and offsets. The plaintiffs are citizens, and Annie B. Ames and Charles L. Ames were until their death, citizens of the United States, and have at all times borne true allegiance to the Government of the United States and have not or any of them in any way voluntarily aided,

abetted, or given encouragement to rebellion against the said government and that the plaintiffs believe the facts as stated in this complaint to be true.

WHEREFORE, the plaintiffs pray judgment in their favor and against the defendant for the said sum of $6,187.07, with interest thereon from the 10th day of March, 1921, at the rate of six per centum per annum, until date of payment as provided by Section 1019 of the Revenue Act of 1924.

Edith Ames English
As Executrix.
Edith Ames English
Plaintiffs.

Claude I. Parker
and
Ralph W. Smith
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,)
)
STATE OF CALIFORNIA,) SS.
)
COUNTY OF LOS ANGELES.)

EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, being duly sworn says:

That they are the plaintiffs in the foregoing Complaint duly subscribed by them and that they have read the same and know the contents thereof, and that they believe the facts as stated in said Complaint to

be true; except as to such matters as are therein stated upon information or belief and as to those matters they believe them to be true.

Edith Ames English
As Executrix
Edith Ames English

Subscribed and sworn to before me this 26th day of May, 1925.

F. G. Cruickshank [Seal]
NOTARY PUBLIC, In and For the County of Los Angeles, State of California.

[Endorsed]: No. 2044-H In the District Court of the United States, in and for the Southern District of California, Southern Division United States of America Edith Ames English, Executrix of the Estate of Annie B. Ames, deceased; and Edith Ames English, as an individual, Plaintiffs, vs. John P. Carter, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant. Complaint (In Law) Filed Jun 1 1925 Chas. N. Williams, Clerk By Edmund L. Smith, Deputy Clerk Claude I. Parker and Ralph W. Smith 808 Hellman Bank Building, Los Angeles, California. Attorneys for Plaintiffs.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNA SOUTHERN DIVISION

EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs,	)	No. 2044-H (J) Law
Vs.	)	
JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.	)	ANSWER

Now comes the above named Defendant by his attorneys, and in answer to the complaint of Plaintiffs herein filed denies and avers as follows:

I.

That the said defendant denies generally and specifically each and every allegation and part of plaintiffs' said complaint herein filed.

WHEREFORE, defendant prays that plaintiffs take nothing by reason of their complaint and that sald defendant have his costs herein expended.

Samuel W. McNabb
United States Attorney by
Donald Armstrong
Assistant United States Attorney
Attorneys for Defendant.

Verification expressly waived.

Claude I. Parker
Ralph W. Smith
Attorneys for Plaintiffs.

STIPULATION

It is hereby stipulated and agreed by and between the above noted parties and their attorneys that the foregoing answer of said defendant is and may be considered as a specific denial of each and every allegation in said Complaint the same and as if the said Answer was specific in this regard and that the said Answer may place in issue each and every allegation in the said Complaint.

Dated this 18th day of AUGUST, 1925.

Claude I Parker
Ralph W. Smith
Attorneys for Plaintiff
Samuel W. McNabb
United States Attorney
by Donald Armstrong
Assistant United States Attorney
Attorneys for Defendant.

[Endorsed]: No. 2044 H. In the District Court of the United States ,for the Southern District of California, Southern Division. Edith Ames English, Executrix of the estate of Annie B. Ames, deceased and Edith Ames English, as an individual, plaintiffs vs John P. Carter, formerly United States Collector of Internal Revnue, defendant. Answer. Receipt of

copy admitted this 29th day of August, 1925 Claude I Parker Ralph W. Smith attorneys for plaintiff Filed Sep 1 1925 Chas. N. Williams, Clerk By L. J. Cordes, Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

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EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs, VS. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.	No. 2044-H (J) LAW FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Court, a jury having been waived by the respective parties, the Honorable Edward J. Henning presiding, and Messrs. Claude I Parker and Ralph W. Smith, appearing as attorneys for plaintiffs and Messrs. Samuel W. McNabb and Donald Armstrong, appearing as attorneys for defendant.

The Court finds that the parties hereto duly stipulated to all the facts in issue, which Stipulation and Agreed Statement of Facts is of record, having been duly filed on the 9th day of October, 1925, and, in this connection, the Court further finds that pursuant to Stipulation of the parties and Agreed Statement of Facts, the Court did on the 5th day of October, 1925, duly make its Order which was filed on the 9th day of October, 1925, in said proceeding, wherein the plaintiffs and defendant were granted time in which to prepare and file briefs in support of their contentions under the facts as duly stipulated to by them, which Order of the Court provided that upon the filing of the Final Brief the said cause should stand submitted; Final Brief having been filed on November 19, 1925, and the Court being fully advised in the premises finds that the facts as stipulated to by the parties are true and correct and that all of the allegations contained and set forth in the complaint of plaintiffs herein on file are true and correct.

The Court further finds that the said Edith Ames English did not succeed within the purview of the Revenue Act of 1917 to any of the joint tenancy estate, as set forth in the complaint, upon the death of Annie B. Ames and no part of the said joint tenency estate is subject to Federal Estate taxation.

CONCLUSIONS OF LAW.

CONCLUSIONS OF LAW from the foregoing facts, the Court legally concludes:—

I.

That upon the death of the said Annie B. Ames no part of the estate held in joint tenancy by her and the plaintiff, EDITH AMES ENGLISH, is subject to Federal Estate taxation or taxable within the provisions of the Revenue Act of 1917 of the United States of America.

II.

That the plaintiffs are entitled to judgment as prayed for in their said complaint in the sum of Six Thousand One Hundred Eighty-seven Dollars and Seven Cents ($6,187.07) and interest thereon in the sum of One Thousand Seven Hundred Eighty-two Dollars and Ninety Cents ($1,782.90), making a total judgment in the sum of Seven Thousand Nine Hundred Sixty-nine Dollars and Ninety-seven Cents ($7,969.97).

That the Judgment of this Court be entered in accordance with the above Conclusions of Law.

DATED at Los Angeles, California, this 7th day of January, 1926.

Edward J. Henning
JUDGE OF SAID COURT.

Approved as to Form:
Donald Armstrong
Asst. U. S. Atty.
Attorneys for Defendant.

[Endorsed]: No. 2044 H (J) Law. In the District Court of the United States of America in and for the Southern District of California Southern Divi-

sion. Edith Ames English, Executrix of the estate of Annie B. Ames, deceased; and Edith Ames English as an individual, plaintiffs, vs. John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, defendant. Findings of Fact and Conclusions of Law. Filed Jan 7 1926 Chas. N. Williams, Clerk By Edmund L. Smith, Deputy Clerk Claude I. Parker, Ralph W. Smith, attorneys for plaintiffs, Hellman Bank Building, Los Angeles.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

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EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, Deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs,	No. 2044-H (J) LAW
Vs.	JUDGMENT
JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.	

This cause came on regularly for hearing before the above entitled Court, the Honorable EDWARD

J. HENNING, presiding, a jury having been waived by the parties, Messrs. Claude I. Parker and Ralph W. Smith, appearing as attorneys for plaintiffs and Messrs. Samuel W. McNabb and Donald Armstrong, appearing as attorneys for defendant. The facts in issue having all been stipulated to by a written Stipulation and Agreed Statement of Facts duly filed by the parties to the action and the said parties having duly stipulated that upon the filing of the Final Brief by the said plaintiffs, the said cause should stand submitted; the Court having made its Order on said Stipulation and Agreed Statement of Facts and the Final Brief having been duly filed, and the case having been closed and duly submitted to the Court for its consideration and decision, after due deliberation thereon the Court files its Findings of Fact and Conclusions of Law and orders that Judgment be entered herein in favor of the plaintiffs and against the defendant in the sum of Seven Thousand Nine Hundred Sixty-nine Dollars and Ninety-Seven Cents ($7,969.97),

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:—

That the plaintiffs, EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased, and EDITH AMES ENGLISH, as an individual, have judgment against the defendant JOHN P. CARTER, formerly United States Collector of Internal Revenue, Sixth District of California, in the sum of

Seven Thousand Nine Hundred Sixty-nine Dollars and Ninety-seven Cents ($7,969.97).

DATED: January 7, 1926.

Edward J. Henning

Judge of Said Court.

Approved as to Form:

Donald Armstrong .

Asst. U. S. Atty.

Attorneys for Defendant.

[Endorsed]: No. 2044-H (J) Law In the District Court of the United States of America in and for the Southern District of California Southern Division Edith Ames English, Executrix of the Estate of Annie B. Ames, Deceased; and Edith Ames English, as an individual, Plaintiffs vs. John P. Carter, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant Judgment Filed Jan 7 1926 Chas. N. Williams, Clerk By Edmund L. Smith, Deputy Clerk. Claude I. Parker Ralph W. Smith Attorneys for Plaintiffs. Hellman Bank Building Los Angeles

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

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EDITH AMES ENGLISH, Executrix of the ESTATE OF ANNIE B. AMES, Deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs, VS. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.) No. 2044-H (J) LAW NOTICE OF ENTRY OF JUDGMENT

TO THE ABOVE NAMED DEFENDANT AND TO MESSRS. SAMUEL W. McNABB and DONALD ARMSTRONG, his attorneys:

YOU AND EACH OF YOU will please take notice and are hereby advised that on the 7th day of January, 1926, Judgment was duly entered in favor of the plaintiffs and against the defendant by the Clerk of the above entitled Court.

Dated this 7th day of January, 1926.

Claude I. Parker
Ralph W. Smith
ATTORNEYS FOR PLAINTIFFS.

[Endorsed]: No. 2044-H(J) Law Dept. In the District Court of the United States of America in and for the Southern District of California, Southern Di-

vision Edith Ames English, Executrix of the Estate of Annie B. Ames deceased; and Edith Ames English, as an individual, Plaintiffs vs. John P. Carter, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant. Notice of Entry of Judgment Received Copy of the within Notice this 11th day of Jan. 1926 Donald Armstrong Asst. U. S. Atty Attorney for deft. Filed Jan. 11 1926 Chas. N. Williams, Clerk, By L J Cordes Deputy Clerk. Claude I. Parker Ralph W. Smith Attorneys for Plaintiffs. Hellman Bank Building Los Angeles

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IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

EDITH AMES ENGLISH, Executrix of the Estate of Annie B. Ames, deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs,	)	NO. 2044-H (J)
VS	)	LAW
JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.	)	STIPULATION OF FACTS.

For the purpose of expediting the hearing and trial (and to conserve the time of court, counsel and par-

ties) of the above entitled action herein at issue on the Answer duly filed by the above named defendant, it is hereby stipulated and agreed by and between the above named plaintiffs and the above named defendant and their attorneys, Messrs. Claude I. Parker and Ralph W. Smith for plaintiffs and Messrs. Samuel W. McNabb and Donald Armstrong for defendant, as follows:

1. That the above named Annie B. Ames was the wife and Edith Ames English the daughter of Charles L. Ames, who died testate a resident and citizen of the County of Los Angeles, State of California, on the 24th day of February, 1915. That on the 19th day of June, 1909, the said Charles L. Ames duly executed his Last Will and Testament, which said Last Will and Testament was duly admitted to probate by the Honorable Superior Court of the State of California, in and for the County of Los Angeles, on the 22 day of March, 1915, and Letters Testamentary were immediately thereafter duly issued thereon to the said Annie B. Ames, executrix, the said Last Will and Testament is in words and figures as follows:—

"

WILL

I, Charles L. Ames, of the City of Pasadena, County of Los Angeles, and State of California, being of sound and disposing mind and memory, and of the age of seventy-four years, do make, publish and declare this my last will and testament, hereby revoking all other wills made by me. That is to say:

I give, devise and bequeath all my property, real, personal and mixed, in fee simple title, and wheresoever situated, to my wife, Annie B. Ames and to my daughter Edith Ames English, to be held by them as joint tenants and not as tenants in common, to them and the survivor of them and the heirs of such survivor forever.

Edith Ames English is my only child and heir at law, and my intention is that she and her mother Annie B. Ames or the survivor shall take my estate in fee simple title with full power to sell, convey, will and *evise* as they see fit to do so.

I make this request of my wife and daughter, that they or either of them shall at no time sign a promissory note or a bond, or obligate themselves or any of their property in any way, manner or form, for the payment of the debt of another.

I make, nominate and appoint my wife, Annie B. Ames, and my daughter, Edith Ames English, executors of this my will without bond, that in the performance of their duties as such executors they shall not be required to give any bonds.

SIGNED, SEALED, PUBLISHED and declared as and for my last will and testament, in the presence of the witnesses named below, who in my presence, and in the presence of each other, at my request have signed their names as witnesses hereto, this nineteenth day of June, nineteen hundred and nine.

Charles L. Ames (SEAL)

WITNESSES:

W. W. Ogier Residing at Pasadena, Calif.
A. M. Harrah Residing at Pasadena, Calif."

2. That the Last Will and Testament of the said Charles L. Ames devised and bequeathed all of his property, real, personal and mixed, to the said Annie B. Ames, his wife, and Edith Ames English, his daughter, in joint tenancy and to the survivor of them.

That thereafter, to-wit, on the 24th day of February, 1916, the Honorable Superior Court of the County of Los Angeles, State of California, duly made and entered its "Order Settling the Final Account and For Distribution Under Will" of all the property and estate of the said Charles L. Ames, deceased, and did then and there distribute said property and estate in accordance with the said Will, which Order and Decree of Distribution, omitting the caption is as follows:—

"Now comes Annie B. Ames and Edith Ames English, the executrices of the will of said deceased, by F. G. Cruickshank, their attorney, and prove to the satisfaction of the Court that their final account and petition for distribution herein was rendered and filed on the 8th day of February, 1916; that on the same day the Clerk of this Court appointed the 23rd day of February, 1916, for the settlement and hearing thereof; that due and legal notice of the time and place of said settlement and hearing has been given as required by law, and the said account and petition are now presented to the Court; and no person appearing to except to or contest said account or petition, the Court, after hearing the evidence, settles said

account and orders distribution of said estate as folfolsw :

It is ordered, adjudged and decreed by the Court that said executrices have in their possession belonging to said estate, after deducting the credits to which they are entitled, a balance of $282,573.00, which consists of personal property and real estate hereinafter described at the value of the appraisement, and that said account be approved, allowed and settled accordingly; that all of said property was the separate property of said deceased; and that in pursuance of, and according to the provisions of the last will of said deceased, all of the residue of said estate, as hereinafter described, and all other property belonging to said estate whether described herein or not, be and the same is hereby distributed as follows, to-wit:

To Annie B. Ames, widow of deceased, and Edith Ames English, daughter of deceased, as joint tenants and not as tenants in common.

The property of said estate hereby distributed so far as the same is known, is described as follows: 30 shares of the capital stock of East Jordan Realty Company; 625 shares of the capital stock of East Jordan and Southern Railroad Company; 125 shares of the capital stock of East Jordan Planing Mills Company; 256 shares of the capital stock of East Jordan Flooring Company; 5000 shares of the capital stock of East Jordan Lumber Company; 14777 shares of the capital stock of the Chicago and Colorado Development and Mining Company; 180 shares of the capital stock

of Sinaloa Land and Water Company; 25 shares of the capital stock of Sinaloa Realty Company; subscription of 25 shares of capital stock of the Conservative Rubber Production Company; 140,000 shares of the capital stock of the Rockhill Mining Company; 1500 shares of the capital stock of Pacific Building Company; 300 shares of the capital stock of the Associated Home Builders; note and mortgage of Robert J. Kerr for $750.00; an undivided ¼ interest in two notes for $500.00 and $1,000.00 signed by Patrick Dowd and Kate Dowd; household furniture and furnishings in the home of deceased; one Hudson automobile; and the following described real property, to-wit:

Parcel 1:—The West 120 feet of Lots 9 and 15 in Division A of the James Smith Tract, in the City of Pasadena, Los Angeles County, California; as per map recorded in Book 6, Page 250, Miscellaneous Records of said County, particularly described as follows, to-wit:

Beginning at the Northwest corner of said Lot 9 in the South Line of Bellevue Drive; thence East along said line 120 feet; thence South parallel with the West line of said Lot 15 to the North line of Palmetto Drive; thence West along the North line of Palmetto Drive 120 feet to the Southwest corner of said Lot 15; thence North along the West line of said Lots 9 and 15 to point of beginning.

Parcel 2:—Lot 7 of Washington Square, in the City of Pasadena, Los Angeles County, California; as per

map recorded in Book 9, Page 50 of Maps, in the Office of the County Recorder of said County.

Parcel 3:—An undivided ½ interest in Lot 8 of Legge's Lower Tract, in the City of Pasadena, Los Angeles County, California, according to a map of said tract recorded in Book 10, Page 18, Miscellaneous Records of said Los Angeles County.

Parcel 4:—The fractional South ½ of Section 7, being that portion thereof bounded on the North and West by the North and West Patented Boundary Lines of the Lands known as and called the "Rancho Santa Ana Del Chino," on the East and South by the East and South Boundary Lines of said Section; in Township 2 South, Range 8 West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California.

Parcel 5:—Section 18, in Township 2 South, Range 8 West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California.

Parcel 6:—The East ½ of Section 13, Township 2 South, Range 9 West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California.

Parcel 7:—Lots 32 and 33, in Section 9, Township 2 South Range 8 West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California; according to a map of the subdivision of part of the Rancho Santa Ana Del Chino, as per plat recorded in Book 6 of Maps, Page 15, of the records of said County.

Parcel 8:—Lots 34, 47, 49 and 50 in Section 9, Township 2 South Range 8 West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California, according to Map "D", being a map of the extension of the subdivision of the Rancho Santa Ana Del Chino, as per plat recorded in Book 12, of Maps, page 47 of the Records of said County.

Parcel 9:—Also the S.E. ¼ of the N.E. ¼ of the S. E. ¼ of Section 9, Township 2 South, Range 8 West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California, otherwise described as Lot 48 in Section 9, as per plat in the Rancho Santa Ana Del Chino, recorded in Book 6 of Maps, page 15 of the Records of said County.

DATED this 23rd day of February, 1916.

James C. Rives

Judge of said Superior Court."

That the said Annie B. Ames died testate a resident and citizen of the County of Los Angeles, State of California, on the 15th day of May, 1918, and thereafter Letters Testamentary were duly issued by the Honorable Superior Court of the State of California, in and for the County of Los Angeles, to Edith Ames English as the executrix of the Last Will and Testament of the said Annie B. Ames, deceased, on the 4th day of June, 1918, and the said Edith Ames English is now and ever since said time has been the duly appointed, qualified and acting executrix of the Last Will and Testament of said Annie B. Ames, deceased, having never defaulted or been discharged.

3. That said Edith Ames English, as executrix, and Edith Ames English as an individual as aforesaid, duly filed on the 9th day of May, 1919, with the Collector of Internal Revenue of the United States for the Sixth District of California, Federal Estate Tax Return, form 706, according to the provisions of law in that regard and the Regulations of the Secretary of the Treasury, established in pursuance thereof. That at the time of filing said Return said plaintiffs made no payment of tax to the Collector of Internal Revenue, Sixth District of California, by reason of the fact that the net estate, as returned, indicated no tax liability. Thereafter, however, on the 11th day of February, 1921, the Commissioner of Internal Revenue, in and for the United States of America, in writing did inform said plaintiffs that the total Federal Estate Tax liability on the said estate was $7,450.67.

4. That the said Return for Federal Estate Tax, made as aforesaid by the said Executrix, did not include for tax purposes in the gross estate of the said Annie B. Ames, deceased, the property so received by her in joint tenancy with Edith Ames English through the Will of the said Charles B. Ames, who died February 24, 1915, although the said property, the taxability of which is herein in controversy, was duly listed under Schedule "D" of said Federal Estate Tax Return, Form 706.

That the property passing in the Will of Charles L. Ames, deceased, and distributed to Annie B. Ames

and Edith Ames English by the Order and Decree of Distribution on the 24th day of February, 1916, is the identical property owned by Annie B. Ames and Edith Ames English at the time of the death of Annie B. Ames, and by them held in joint tenancy, and is the same and identical property returned herein and noted in Schedule "D" for Federal Estate Tax purposes and upon which the Treasury Department of the United States of America claims a tax.

5. That on the 11th day of February, 1921, over the protest of the above named plaintiffs, the Honorable Commissioner of Internal Revenue did on said day add one-half of all of the said property so received by Annie B. Ames, deceased, and Edith Ames English under the Last Will and Testament of Charles L. Ames, deceased, and so owned by them as joint tenants, to-wit, of the value of $220,330.83, to the gross taxable estate of the said Annie B. Ames, deceased, and did thereupon assess an additional Federal Estate Tax, chargeable to plaintiffs in the sum of $7,450.67.

That on the 10th day of March, 1921, the plaintiffs paid under written protest to the said defendant, as Collector of Internal Revenue, Sixth District of California, the said sum of $7,450.67; that thereafter, on the 27th day of April, 1921, plaintiffs duly filed with the defendant for transmittal to the said Commissioner of Internal Revenue, a Claim for Refund for the refundment of the said sum of $7,450.67 heretofore paid, which Claim for Refund, was, thereafter, on the 19th

day of August, 1921, duly allowed by the Honorable Commissioner of Internal Revenue in the sum of $1,263.60 and rejected in the sum of $6,187.07. That the Plaintiffs are the owners of the Claim for Refund of tax upon which this suit is brought. No other action has been had on said Claim in Congress or by any Department and no person other than plaintiffs are the owners thereof or interested therein, no assignment or transfer of said Claim or any part thereof or interest therein has been made by plaintiffs or either of them. The plaintiffs and each of them are citizens, and Annie B. Ames and Charles L. Ames were until their death, citizens of the United States, and residents of and domiciled in the State of California, and have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, or given comfort to any sovereign or government that is or ever has been at war with said United States.

6. Any party to this stipulation may, upon the hearing or trial of this matter, introduce as evidence of the facts herein stated, the whole, or any part, of this stipulation; subject to the right of any other party to object thereto on the grounds that the same is immaterial, incompetent or irrelevant, or any other objection that they might see fit to make, except as to the manner in which the evidence is presented. The

parties may introduce such other and further evidence as may be material, relevant and/or competent.

DATED this 8 day of October, 1925.

Claude I. Parker
Ralph W. Smith
Attorneys for Plaintiffs.
Donald Armstrong
Assistant U. S. Atty
Attorneys for Defendant.

[Endorsed]: No. 2044-H (J) Law. In the District Court of the United States of America, in and for the Southern District of California Southern Division. Edith Ames English, Executrix of the Estate of Annie B. Ames, deceased; and Edith Ames English, as an individual, plaintiff vs. John P. Carter, Formerly U. S. Collector of Internal Revenue, 6th District of California Defendant. Stipulation of Facts. Filed Oct. 9 1925 Chas. N. Williams, Clerk, by Edmund L. Smith, deputy clerk Claude I. Parker Ralph W. Smith Attorneys for Plaintiffs. Hellman Bank Building Los Angeles

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

EDITH AMES ENGLISH, Executrix of the ESTATE OF ANNIE B. AMES, Deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs and Defendants in Error, vs. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant and Plaintiff in Error.	No. 2044-H (J) LAW ASSIGNMENT OF ERRORS.

And now comes the plaintiff in error, by Samuel W. McNabb and Donald Armstrong, his attorneys, and in connection with his petition for a writ of error says that in the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

I.

That the court erred in not entering judgment for the plaintiff in error herein upon the agreed statement of facts and upon the facts as found by the court in its findings of fact.

II.

That the conclusions of law as made by the court are not supported by the findings of fact.

III.

That the judgment as entered herein is contrary to law.

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed.

Dated: Los Angeles, California, this 16 day of March, 1926.

SAMUEL W. McNABB,
United States Attorney,
Donald Armstrong
Donald Armstrong,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

We hereby certify that the foregoing assignment of errors is made in behalf of the plaintiff in error hereinabove named, for a writ of error and is, in our opinion, and the same now constitutes the assignment of errors upon the writ prayed for.

SAMUEL W. McNABB,
United States Attorney,
DONALD ARMSTRONG,
Assitant United States Attorney,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 2044-H (J) In the District Court of the United States for the Southern District of California Southern Division Edith Ames English, et al., Plaintiffs and Defendants in Error, vs. John P. Carter, Defendant and Plaintiff in Error Assignment of Errors. Filed Mar 16 1926 Chas. N. William, Clerk By R S Zimmerman Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

EDITH AMES ENGLISH, Executrix of the ESTATE OF ANNIE B. AMES, Deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs and Defendants in Error, vs. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant and Plaintiff in Error.	No. 2044-H (J) LAW PETITION FOR WRIT OF ERROR.

TO THE HONORABLE EDWARD J. HENNING, Judge of said Court:

Now comes the defendant, John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, by Samuel W. McNabb and Donald Armstrong, his attorneys, and feeling himself aggrieved by the final judgment of this court entered against him and in favor of Edith Ames English, executrix of the estate of Annie B. Ames, deceased, and Edith Ames English, as an individual, on the 8th day of January, 1926, hereby prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Southern District of California; and in connection with this

petition, petitioner hereby presents his assignments of error.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of this cause.

SAMUEL W. MC NABB,
United States Attorney,
Donald Armstrong
DONALD ARMSTRONG,
Assistant United States Attorney,
Attorneys for Defendant and
Plaintiff in Error.

[Endorsed]: No. 2044-H (J) Law In the District Court of the United States for the Southern District of California Southern Division Edith Ames English, et al., Plaintiffs and Defendants in Error, vs. John P. Carter, Defendant and Plaintiff in Error. Petition for Writ of Error. Filed Mar 16 1926 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

EDITH AMES ENGLISH, Executrix of the ESTATE OF ANNIE B. AMES, Deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs and Defendants in Error, vs. JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant and Plaintiff in Error.	No. 2044-H (J) LAW STIPULATION CONCERNING TRANSCRIPT ON APPEAL.

IT IS HEREBY STIPULATED by and between the parties to the above entitled cause, through their respective attorneys, that the transcript on appeal shall consist of the following documents, papers and records:

1. The complaint filed by the plaintiffs,
2. The answer filed by the defendant,
3. The agreed stipulation and statement of facts,
4. The findings of fact and conclusions of law,
5. The judgment,
6. The notice of entry of judgment.
7. The petition for a writ of error,
8. Assignments of error,
9. Citation
10. The writ of error.

IT IS FURTHER STIPULATED by and between the parties above named, through their respective counsel that the agreed statement of facts contains all

of the evidence presented to the Court in the above entitled action and shall be and is included in the said transcript of record in lieu and in place of a bill of exceptions, and that no bill of exceptions need be filed by the plaintiff in error herein.

IT IS FURTHER STIPULATED by and between the respective parties in the above entitled action, through their respective attorneys that the merely formal parts of the papers and pleadings need not be included in the transcript of record.

Dated: Los Angeles, California, March 18th, 1926.

CLAUDE I. PARKER,
RALPH W. SMITH,
By Ralph W. Smith
Attorneys for Plaintiffs and
Defendants in Error,
SAMUEL W. McNABB,
United States Attorney,
Donald Armstrong
Assistant United States Attorney,
Attorneys for Defendant and
Plaintiff in Error.

IT IS SO ORDERED.

Edward J. Henning
United States District Judge.

[Endorsed]: No. 2044-H (J) Law In the District Court of the United States for the Southern District of California Southern Division. Edith Ames English, et al., plaintiffs and defendants in error, vs. John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, defendant and plaintiff in error. Stipulation Concerning Transcript on Appeal. Filed Mar 20 1926 Chas. N. Williams, Clerk By L. J. Cordes, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

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EDITH AMES ENGLISH, Executrix of the ESTATE OF ANNIE B. AMES, Deceased; and EDITH AMES ENGLISH, as an individual, Plaintiffs,	No. 2044-H (J) LAW
VS.	CLERK'S
JOHN P. CARTER, Formerly United States Collector of Internal Revenue, Sixth District of California, Defendant.	CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 40 pages, numbered from 1 to 40 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, and order allowing writ of error, complaint, answer, findings of fact and conclusions of law, judgment, notice of entry of judgment, stipulation of facts, assignment of errors, petition for writ of error, and stipulation concerning transcript on appeal.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to..... and has been charged to the United States of America the plaintiff-in-error herein.

IN TESTIMONY WHEREOF, I have hereunto set by hand and affixed the Seal of the District Court for the United States of America, in and for the Southern District of California, Southern Division, this.....day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, and of our Independence the One Hundred and Fiftieth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4838.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California,

Plaintiff in Error,

vs.

Edith Ames English, Executrix of the Estate of Annie B. Ames, Deceased; and Edith Ames English, as an Individual,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

SAMUEL W. MCNABB,
United States Attorney.
DONALD ARMSTRONG,
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 4838.

IN THE

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California,

Plaintiff in Error,

vs.

Edith Ames English, Executrix of the Estate of Annie B. Ames, Deceased; and Edith Ames English, as an Individual,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

I.

Statement.

This was an action brought in the District Court of the United States, in and for the Southern District of California, Southern Division, by the defendants in error, to recover federal estate taxes paid under protest. The complaint in this action was filed on the 1st day of June, 1925. Thereafter and when the cause was at issue, a stipulation of facts was entered into and upon such stipu-

lation of facts the cause was presented for determination to the Honorable Edward J. Henning, judge of the District Court, as aforesaid, a jury having been waived by the parties, and judgment was given in favor of the defendants in error and against the plaintiff in error in the sum of $7969.97. The material facts may be summarized as follows:

By the terms of the will of Charles L. Ames, the father of defendant in error, who died testate February 24, 1915, certain real property, located in the state of California, was devised to the defendant in error herein and her mother, Annie B. Ames, and the survivor of them, in joint tenancy. Annie B. Ames died May 15, 1918. Federal estate taxes, on one half of the value of the aforesaid joint estate were assessed against the gross estate of Annie B. Ames, pursuant to section 202 (c) of the Revenue Act of September 8, 1916, which taxes were paid under protest by the executrix, and which were sought to be recovered in this cause.

II.

Specifications of Error.

The errors, assigned by the appellant, are, first, that the court erred in not entering judgment for the plaintiff in error upon the agreed statement of facts; and secondly that the conclusions of law, as made by the court, are not supported by the findings of fact and hence that the judgment, as entered, is contrary to law.

The Government's position is not that the Revenue Act of September 8, 1916, is retroactive, and covers and attempts to tax a transfer fully executed and completed

before its enactment, but rather, to use the language of the pertinent sections of the act, has taxed "the value *at the time* of his (decedent's) death *of all property* * * * (c) to the extent of the interest therein *held jointly* * * * *by the decedent and any other person*" (italics ours).

It must be admitted that in this case the decedent, defendant in error's mother, at the time of her death, held jointly with another person, the defendant in error, property as a joint tenant. The words "property held jointly by the decedent and any other person" can mean nothing less than "property owned jointly by the decedent and any other person," or "property of which the decedent and another person are jointly seized or possessed," that is, "the joint property of decedent and any other person" at the time of the decedent's death. The language is so clear as to prohibit other construction.

It cannot be seriously suggested that a statute relating to "all property * * * *held* * * * by the decedent" at the time of his death refers only to property acquired after the passage of the act, and such is the necessary result of the defendant in error's contention. If this contention be correct, then manifestly the same suggestion applies to sub-section (a) of the act, which relates to all property which the decedent held separately at the time of his death. If the status of ownership at the time of death must be modified by the time of acquisition, then no property can be included in a decedent's gross estate if it was acquired prior to the passage of the act, regardless of the state of ownership at the time of death. The act would only apply to property acquired by the de-

cedent after the passage of the act. Since, however, the statute is founded not upon the acquisition of rights by the decedent, but the cessation of his rights at death, such a construction defeats the real purpose and plan of the statute.

The most strict construction of the words "held * * * jointly by the decedent and any other person" strengthens rather than weakens the government's position. To justify the construction which was contended for by the defendant in error, it is necessary to interpolate a special proviso excepting from the general language of the statute all joint tenancies created prior to the passage of the act. The statute in effect says "all property held jointly by the decedent." The construction necessarily placed on it by the court below makes it read "all property held jointly by the decedent except property held jointly prior to the passage of the act." The act contains no such exception, and affords no reason or basis for assuming that such an exception should be read into it.

III.

It Is Reasonable to Include Property Held Jointly by the Decedent in Decedent's Gross Estate.

(a) *The nature of the Federal Estate Tax.*

The federal estate tax imposed by the Revenue Act of 1916, as amended, is not a direct tax upon property, but belongs to that class of indirect taxes known generally as "death duties." Such taxes rest "in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and

that it is the power or the transmission from the dead to the living on which such taxes are more immediately raised."

Knowlton v. Moore, 178 U. S. 41, 56.

The transmission upon which such taxes are raised may, of course, be a transmission of title by reason of death. On the other hand, the transmission may be merely of the physical property, that is, of the possession and enjoyment.

Scholey v. Ren, 23 Wall. 331;
Wright v. Blakeslee, 101 U. S. 174.

Whenever, therefore, there is a change either of title or possession or enjoyment resulting from death, there is an occasion upon which a "death duty" may be imposed. Such "death duties" may be imposed either with respect to the cessation of the decedent's interest, or with respect of the receipt by the beneficiary.

The federal estate tax belongs to that class of "death duties" which are imposed by reason of the cessation of the decedent's interest.

New York Trust Company v. Eisner, 256 U. S. 345;
Greiner v. Lewellyn, 258 U. S. 384;
United States v. Woodward, *et al.,* 256 U. S. 632;
Y. M. C. A. v. Davis, 264 U. S. 47;
Edwards v. Slocum, 264 U. S. 61.

The federal estate tax then is an excise upon the beginning of the transmission upon the cessation of decedent's interest in property, which, during his life time,

he owned. This tax, being an excise tax, must be measured, and that measure lies within the sound discretion of Congress.

It cannot be arbitrary, but if it bear a reasonable relation to the subject matter of the tax, it will not be subject to review by the courts. For this purpose, Congress has looked not to the dates or manner of acquisition but to the date and manner of cessation. As construed by the Supreme Court, the statute does not include property in which the decedent's interest ceased prior to the passage of the act, but it seems to be a logical, if not a necessary, thing to include the value of estates held in joint tenancy in which both tenants have, during their life time, a joint interest, which interest as to each tenant ceases upon his death and after the passage of the act.

If Congress has failed to include them, it has missed so much of its general purpose. When it fixed as the measure of the tax "the value of the net estate," which value is defined as the result of deducting from the gross estate certain amounts specified by the statute, it clearly intended that the rate of tax should depend not upon the transmission by death, viz. upon the occasion of the tax, but upon the matters related to that occasion. The tax is imposed upon the "transfer of the net estate." The amount of a federal estate tax is the sum of certain percentages of the value of the net estate. With reference to the actual property owned by decedent at the time of his death and transferred thereby, the amount of tax is greater proportionately where the decedent has in his life time made certain dispositions of his property, or holds at the time of his death certain classes of property. Thus

the rate of tax is determined by what the decedent does in his life time.

It is permissible for Congress to determine the rate of tax by reference to property or transactions which could not of themselves be taxed. This is decided in the case of Maxwell v. Bugbee, 230 U. S. 525, and again in Flint v. Stine Tracey Company, 220 U. S. 107. On the other hand, the Supreme Court has held that where the tax itself is imposed with reference to property or transactions over which there is no jurisdiction to tax, it cannot be valid by saying that the tax is merely measured by such property or transaction. (Frick v. Commonwealth of Pennsylvania, 45 Sup. Ct. Rep. 603.) In the instant case there has not been any attempt by Congress to tax either the transfer creating the joint tenancy or a transfer from the decedent to the survivor. Certainly neither the language nor the structure of the act discloses such an attempt, for from both it is perfectly apparent that the "gross estate" is built upon the theory that because the occasion of the tax does not include certain transactions, that is, the mere holding of an estate, the rate of tax should, in the interest of equality, be increased. Assuming that such transactions could not of themselves be taxed, because they are subject only to state regulations, Congress has made them the basis for determining the rate, relying upon the principle enunciated by this court in Maxwell v. Bugbee, *supra.*

(b) *The reason which justifies the inclusion of the estates created after the passage of the act, also justifies the inclusion of estates created prior to the passage of the act.*

The question now being considered is solely one of the reasonableness of classifying joint tenancies with other forms of property for the purpose of measuring the federal estate tax. It must be quite apparent, that, as has been pointed out, the rights of the owners of an estate held in joint tenancy are not fully determined and fixed until the death of one of the tenants. Until that time it is not determined upon whom the survivorship will fall. Neither tenant has the complete and indefeasible and assured right to enjoy the fee. His rights are dependable upon his longevity. His rights cease at death. It is this relationship of death to the consummation or cessation of title that impresses such estates with their quasi-testamentary character and associates them with property, the transfer of which is actually accomplished by death. This relationship is inherent in such estates and in no sense depends upon the time when the estate was created or the taxable occasion, that is, death, occurred. Consequently the classification is none the less reasonable because of the incidental circumstances, that the classification was made after the estate was created. The classification is based not upon the fact that there was a transfer at death, but upon the fact that the decedent's interest terminated at that time.

The time when the estate was created does not change its inherent characteristics or the manifest injustice which would follow a failure to include it in the measure

of the tax. *The power of Congress to measure a tax on a present particular occasion by past transactions or circumstances has been upheld as reasonable by the courts.* (Brushaber v. Union Pacific Railroad Co., 240 U. S. 1-20.)

In the case of Schuster & Company v. Williams (283 Fed. 115), it is held that it is lawful to measure an excise tax by the value of the property owned by the taxpayer in the preceding year. In the case of Pennsylvania Company v. Lederer (292 Fed. 629), it was held that the inclusion of property passing under a general power of appointment created prior to the passage of the act was a reasonable method of measuring the federal estate tax and it was likewise held by the District Court of Maryland in the case of Safe Deposit and Trust Company v. Tait (295 Fed. 429), that the inclusion in the gross estate of transfers intended to take effect at or after death was a reasonable method of measuring the tax, although such transfers were made prior to the passage of the act.

Other cases in which the excise tax has been measured by an occurrence which took place prior to the passage of the act are:

Hylton v. United States, 3 Dall. 171;
Flint v. Stone-Tracy Co., 220 U. S. 107;
Carbon Steel Co. v. Lewellyn, 251 U. S. 501;
Hecht v. Malley, 265 U. S. 144;
Shwab v. Richardson, 263 U. S. 88;
Patton v. Brady, 184 U. S. 608;
Railroad Co. v. Collector, 100 U. S. 595;
Stocksdale v. Insurance Co., 20 Wall. 323;
Billings v. United States, 232 U. S. 261.

No conclusion in this case can be based upon the decisions of state courts to the effect that the state cannot constitutionally tax as a transfer at death the passing of the survivorship in a joint estate created prior to the passage of the act. In the first place such cases are decided under constitutional restrictions applicable to states but not to Congress.

For another reason the decisions of the state courts are not authorities in the instant case. This is a case in which any retroactive feature which may be present *relates solely to the measure of the tax.* On the other hand, state taxes are levied upon the *transfer* of the particular property held in joint tenancy. The transfer is not the *measure* of the tax, but it is the *occasion* of the tax. Manifestly constitutional prohibitions against taxing an occasion which has passed are different from those which apply to the taxation of the present occasion, although measured by some past event. In the first case, there is an interference with vested rights. In the second case, the value of the property used as a measure of the tax is not increased or lessened to any extent by being included in the measure. The survivor is not taxed, his interest is not taxed, the transfer to him is not taxed. The tax is solely upon the interest of the decedent which ceased at the time of his death and is payable solely out of the property of the estate.

The command of the statute then is that if two persons shall, after the passage of the act, hold an estate in joint tenancy, and if while this estate is so held, one of the tenants dies, the interest in that property, held by the decedent at his death must be included in the gross estate

of the decedent. It is apparent that the estate involved in the instant case being held by the decedent at the time of her death as a joint tenant is exactly within the words and meaning of section 202 (c). Moreover, as has been previously shown, such an estate is exactly within the spirit of the act which purports to include in the measure of the tax all of the decedent's property which she continued to "hold" after the passage of the act and in which her interest ceased by reason of her death.

V.

The Case of Knox v. McElligott Should Be Controlling in the Instant Case.

The case of Knox c. McElligott (258 U. S. 546), is a case involving the taxing of an entire joint tenancy estate. One half the value of this joint estate was included in the return filed by the executor of the estate of the decedent. Subsequently, however, an additional estate tax was assessed by the Commissioner of Internal Revenue on the remaining one half value of the said joint estate. The Supreme Court in the Knox case, *supra,* held it was not proper to tax the entire estate and cited in support thereof Levy v. Wardell, Union Trust Company v. Wardell and Shwab v. Doyle, *supra.* Because of the nature of the estate, the District Court found that the undivided one half interest which had been transferred to the surviving wife prior to the passage of the act was not taxable but held that the decedent's undivided one half interest was taxable. Therefore, it clearly appears that the Supreme Court of the United States in the Knox case has distinctly and clearly mani-

fested its approval in taxing the decedent's interest in a joint tenancy, the decedent's interest being measured by one half the value of the joint estate, which case, it is respectfully submitted, should be and is controlling in the instant case.

Walker v. Grogan (283 Fed. 530), is a case involving the same principle enunciated in the case of Knox v. McElligott and is another case authorizing taxation of the decedent's interest in a joint tenancy.

Conclusion.

In conclusion, the Government's position is briefly summarized as follows:

1. The facts of this case bring it squarely and clearly within the pertinent sections of the statute.

2. The statute, in authorizing the taxation of the value of decedent's interest in the joint estate, is not retroactive. It merely adds to decedent's gross estate the value of her interest in the joint estate at the time of her death and is not a tax on the original transfer of the joint estate as contended by plaintiff.

Therefore, it is respectfully submitted that the tax levied by the commissioner was lawful and correct, and that the judgment appealed from should be reversed.

Respectfully submitted,

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No. 4838.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California,

Plaintiff in Error,

vs.

Edith Ames English, Executrix of the Estate of Annie B. Ames, Deceased, and Edith Ames English,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

"The right to own property, to grant it, and to dispose of it by will is within control of states, not of nation."

Frew v. Bowers, 12 F. (2d) 625.

(All italics ours.)

STATEMENT.

Briefly the stipulated facts are: That prior to September 8, 1916, being the date that our national government embarked upon the taxing of estates as a means

of revenue in this decade, the will of Charles L. Ames, who died on the 24th day of February, 1915, was admitted to probate, the will having been executed on the 19th day of June, 1909, more than six years preceding the enactment of the law under which the question here presented must be determined. In his will, we find among other things this paragraph:

"I give, devise and bequeath all my property, real, personal and mixed, in fee simple title, and wheresoever situated, to my wife, Annie B. Ames and to my daughter Edith Ames English, to be held by them as joint tenants and not as tenants in common, to them and the survivor of them and the heirs of such survivor forever." [R. p. 25.]

No question is here made as to any tax on the estate of Charles L. Ames, deceased, but the government contends that as Annie B. Ames, one of the joint tenants aforesaid, died on the 15th day of May, 1918, after the enactment of the Revenue Act of 1916, one-half interest in the joint tenancy estate received under the provision of the will aforesaid is subject to Federal Estate taxation in her estate.

The Statute.

The sections of the Revenue Act of 1916 with which we are directly concerned are as follows:

> "Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of

this act, whether a resident or nonresident of the United States:

"One per centum of the amount of such net estate not in excess of $50,000."

Then follow a graduated scale of percentages.

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * * *

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The Law.

At the outset an examination should be made of the substantive law of the state of California, for in determining the authority or power of the Federal government to exact a tax on transfers of property, the law of the domicile of decedent is important if not persuasive.

"What is property and what is a part of the estate of a decedent is determined by the law-making power of the state. * * *

Congress, it is true, cannot change the law of property in the states."

Fidelity Trust Company v. McCaughn, 1 F. (2d) 987.

The right to transmit or succeed to property at death is a state given right not a federal right, and it is only by the privilege granted by the state to the citizen to dispose of property at death that an heir may succeed to the property of an ancestor. Should the state deny this privilege and cause all property upon the death of the owner to escheat to the state, then the federal government's inheritance tax would become inoperative insofar as that particular commonwealth is concerned; authority for this proposition we cite the recent case of

Stebbins v. Riley, 268 U. S. 137.

Therefore, we contend that if the Legislature of the state of California has not power or authority to make its State Inheritance Tax Act retroactive so that the interest in property which had previously vested subject only to a contingency, which contingency might happen during the life of the statute, certainly no greater power exists in our Federal Congress. The limit of authority of a California Legislature in this regard is indicated by the case of *Hunt v. Wicht,* 174 Cal. 204:

> "Concededly such a transfer may be taxed by the state. The difficulty in the case at bar is that at the time the deed was so executed and delivered to Mathilde Wicht in escrow there was no law imposing any tax on such a transfer as was here made. * * *"
>
> "We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a present title in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (Estate of Cornelius, 151 Cal. 550 (91 Pac. 329)) of this prop-

erty in fee simple absolute, subject only to this life interest. Could the Legislature subsequently lawfully impose a succession tax upon this fully executed transfer of title, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life esate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. *The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible,* and the Legislature could not thereafter lawfully destroy, impair or burden this property right under the guise of a succession tax on account of the transfer."

In determining the *quantum* under the Federal Estate Tax Act of exemption allowable to a California estate by reason of our community property system, the federal courts in the case of *Blum v. Wardell,* 276 Fed. Rep. 226, and in *Robbins v. United States,* 5 Fed. Rep. (2d)

690, looked only to the statute or the substantive law of California, limiting the right to enforce its tax by the law of this state.

The Substantive Law of the State of Decedent's Domicile at Time of Death Governs the Interest in the Estate of a Testator for the Purpose of the Federal Estate Tax Law and the Federal Government in Placing a Tax Upon the Devolution of Property at Death Can Only Be Co-Extensive With the State Privilege Which Affords the Right to Succession.

Both at common law and under the Civil Code of California, the legal effect of a joint tenancy in property is that the title to the joint property does not pass to and vest in the surviving tenant upon the death of his co-tenant, but that either tenant is seized of the whole estate and each and every atom and part thereof from the first or the time of the creation of the joint tenancy and no change occurs in his title upon the death of his co-tenant.

The identical question at issue here has been before the Supreme Court of California, that court holding that the Legislature of the state of California could not place an inheritance tax burden on an estate of a joint tenant who died after the enactment of a taxing amendment to the Inheritance Tax Act if the joint tenancy had been created prior to the enactment. We refer to the case of *Estate of Guernsey,* 177 Cal. 211. The syllabus reads:

> "Both at common law and under the Civil Code of California the legal effect of a joint tenancy is that the title to the joint property does not pass to and

vest in the survivor, upon the death of his cotenant, but that each tenant is seized of the whole estate from the first, and no change occurs in his title on the death of his cotenant. * * * "

"The question of liability to inheritance tax must be determined by the law in force at the time title vests by virtue of a transfer."

In the *Estate of Potter,* 188 Cal. 55, the Supreme Court of California held that the California Inheritance Tax Act cannot be given a retroactive effect upon transfers vesting prior to its passage, so as to increase the tax thereon, and an attempt to do so would be void.

Paragraph one of the syllabus of the case of *Pennsylvania Company et al. v. Lederer,* 292 Fed. 629 reads:

"Interest in the estate of a testator for the purpose of the Federal Tax Law, are determined by the laws of the state in which the testator was domiciled at the time of death."

We have no quarrel with the proposition that the Federal Government, with its delegated powers from the sovereign states, may impose certain conditions upon the succession of property, but we insist that the right of the Federal Government in the collection of its tax to interfere wth vested rights in property, inaugurate or change the laws of succession or to interfere with or foreclose the sovereign state from the collection of its inheritance tax can only be maintained by an express constitutional grant, which delegation has never been made by the states.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the

states, are reserved to the states, respectively, or to the people."

10th Amendment to the Constitution of the United States.

The Facts of This Case Bring It Without the Language of the Statute for Upon the Death of Annie B. Ames There Was No Transfer of Her Interest Within the Language of the Statute.

Sec. 201. "That a tax * * * is hereby *imposed* upon the *transfer* of the net estate of every decedent."

An analysis of the section indicates that a transfer is necessary for the imposition of the tax. Unless there was a transfer of the one-half interest in the joint tenancy estate upon the death of Annie B. Ames to Edith Ames English the government must fail. As the statute imports, it is an excise on the transmission or *transfer* of property from a decedent to those chosen to take. That which is taxed is the right or privilege of transmitting property.

"Confusion of thought may arise unless it be always remembered that fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is *the subject levied upon by death duties.* * * * No property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

Knowlton v. Moore, 178 U. S. 41.

In the case of *Edwards v. Slocum,* 264 U. S. 61, Mr. Justice Holmes said:

"This is not a tax upon a residue, it is a tax upon a transfer."

The government on page 6 of its brief says "the statute is founded not upon the acquisition of rights by the decedent, but the cessation of his rights at death."

The statute expressly imposes the tax upon the *transfer,* and as the only transfer in connection with the joint tenancy estate was the transfer in the will of *Charles* L. Ames, it would seem that the case of *Estate of Guernsey, supra,* would for all times foreclose any doubt as to the complete and unlimited ownership of each joint tenant in a joint tenancy estate, so well settling this principle under the laws of the sovereign state of California that no "confusion of thought may arise." We quote from the final paragraph of the opinion in that case:

> "The agreement determined the persons who had the right of control of the property, and by its terms the wife had as full control as the husband. Upon the death of either the property remained, and all of it remained, the property of the survivor, as it was, in contemplation of law, from the time of its creation."

The many pages that the Government has devoted in its brief to the proposition that its tax is not upon the *transfer* or passing of property but upon the *cessation* of an interest, was exploded we would have presumed for all time, by the well reasoned opinion in *Lynch v. Congdon,* 1 F. (2d), 133-135:

> "It is the theory of plaintiff in error that the tax is not upon the transfer of property included in the gross estate, *but upon the cessation of decedent's interest in these deposits;* that it is not a question

> of transfer from a joint depositor to the surviving joint depositor; that there is in fact no such transfer, each depositor being an owner of the entire interest in the entire property during their joint lives, and therefore there is no passing of property from decedent to the survivor, but merely a cessation of decedent's interest in the property; that such property is the same as any other property, and that Chester A. Congdon had the entire interest in the same, and that it ceased by reason of his death. However interesting and debatable as a matter of first impression this theory may be, we think consideration of it foreclosed by the decision of the Supreme Court of the United States in Shwab v. Doyle, 258 U. S. 529, 42 Sup. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454 and companion cases."

Claims of unlimited scope are made for the tax imposing provisions of the Revenue Act, but it is not certain if the government claims the act has the effect of substantive law or that it can supersede the law of the state of California, making all joint tenancies whenever created in fact tenancies in common and thus causng a transfer of one-half of the tenancy at the time of death of a co-tenant.

Knowlton v. Moore, supra, is cited and the principle of the case reaffirmed in the case of *New York Trust Company v. Eisner,* 256 U. S. 345,

> "For if the tax attaches to the estate before distribution, if it is a tax on the right to transmit, or on the transmission at its beginning obviously it attaches to the whole estate."

Again in *Frew v. Bowers,* 12 Fed. (2d) 625:

> "It is not on the transfer of 1910; and at that date there was no tax burden of any kind upon what Mr. Nash then did. It is not laid because Mr. Nash died owning or having any testamentary power over what he parted with in 1910. The statute does not pretend to declare *ownership,* and it could not if it would; for the right to own property, grant it, and dispose of it by will is a matter for the states, and not the nation. * * * "

In the case of *Lynch v. Congdon, supra,* the identical point here presented was decided adverse to the government, the facts paralleling the facts in the instant case. We quote from the opinion:

> "The sole question presented in this: Did the money deposited in the two banks by Chester A. Congdon to the joint account of himself and Clara B. Congdon, or the survivor, prior to the passage of the Estate Tax Act of 1916, constitute a part of the gross estate of the decedent, Chester A. Congdon, within the purview of subdivision (c) of Secton 202 of the Revenue Act of 1916, 39 Statutes at Large, 756 (Comp. St. S6336½c), known as the Estate Tax Act? Said section is as follows. * * *"

On these facts Mr. Circuit Judge Kenyon said:

> "* * * The status of Clara B. Congdon, the wife, and her right in the joint deposits, were fixed before the passage of the Tax Act by the Congress * * *."

> "* * * The arrangement gave to her a present joint ownership of the funds represented by the certificates, and the right of sole ownership if she survived him. This transaction was complete be-

fore the passage of the act. Unless the act providing for such tax is retrospective in its operation the tax assessed and collected was invalid. The Supreme Court has settled this question as to this very act in Shwab v. Doyle, 258 U. S. 529, 536, 42 Sup. Ct. 391, 393 (66 L. Ed. 747, 26 A. L. R. 1454). From the opinion we quote: 'We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of Congress, and have resolved that it should not be construed to apply to transactions completed when the act became a law.'"

In Munroe v. U. S., 10 Fed. (2d) 230, the court said:

> "The one-half interest of a surviving spouse which under the laws of Nebraska becomes absolute by operation of law upon the death of the other was held not subject to the Federal estate tax."

Although quotations are found in the government's brief from subsection (c) of section 202, no reference is made to the exception noted in subsection (c), to-wit:

> "Except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

Since the interest and ownership in the whole of the joint tenancy was absolute in each tenant from the time of creation, and the surviving tenant takes not by succession but by original grant, it follows that all of the joint tenancy estate *originally belonged* to the surviving tenant. Certainly the one-half which the government might take *never * * * belonged to the decedent.*

It is an anomaly to lay a present excise tax or a transfer tax on a privilege which was exercised long before the tax existed. There is just as much authority and logic for the government to tax the whole of the joint tenancy estate here involved as a one-half interest therein, for neither the deceased or the surviving tenant contributed any part to the creation of the estate. It came to them through the will of Charles L. Ames, and the expression of subsection (c) of section 202 would exempt from tax that part of the joint tenancy estate that may be shown to have originally belonged to such other or surviving person and never to have belonged to decedent. Certainly in the instant case it cannot be said that any part of the joint tenancy estate originally belonged to Annie B. Ames, deceased, and therefore placing a fair construction on the section, it follows as no interest n the property which "originally belonged" to the said Annie B. Ames passed upon her death no tax should attach.

Estate of Huggins, 139 N. E. (N. J.) 442, is a case involving the taxability of a joint tenancy, although the court determined the interest in the joint tenancy estate to be taxable upon the death of a co-tenant, it based its decision on the fact that the *tenants themselves created the estate,* and the tenants' action in so creating the estate amounted to a testamentary gift to the survivor. The court ably distinguished this case from a case where property is conveyed by another to two persons in joint tenancy, where the deceased tenant did not create or participate in the creation of the joint tenancy, in such instances there would be no taxable transfer under the New Jersey law upon the death of one of the tenants

as the deceased contributed nothing to the joint tenancy estate. It would seem that Congress contemplated just such a situation as this in writing subsection (c) of section 202 of the Act.

The New Jersey case makes a differentiation by a court decision while Congress has made a distinction, and exempted from tax joint tenancy estates, where the deceased joint tenant did not participate in the creation of the joint tenancy.

On page 8 of the government's brief we find

> "The tax is imposed upon the transfer of the net estate."

In considering this statement it must be remembered that the property herein involved in the joint tenancy estate was not listed in the inventory, nor did it pass at death to the executor, nor was it in any wise administered upon in the estate of Annie B. Ames, deceased. The right of the surviving tenant continued unimpaired by reason of the previous grant in the will of Charles L. Ames, deceased. There was no transfer by reason of the death of Annie B. Ames. Hence this property did not pass at death and it cannot be seriously argued that the government could arbitrarily measure its tax on the property passing in an estate by considering foreign factors, thus a fixed and vested interest, before its law was contemplated, to augment the tax and thus place a greater tax burden upon one estate than on another where a like value of property has passed?

> "To measure the tax which the estate of one person should pay by the value of the estate of another person deserves as a scheme of taxation all

the censure which counsel for defendant has heaped upon it."

Pennsylvania v. Lederer, 292 Fed. 629.

The Court Will Not Enlarge or Extend the Legislative Language to Meet a Circumstance Not Specifically Falling Within Its Provisions.

The levy and assessment of taxes by the sovereign power is of purely statutory origin. Whether a tax is or is not due depends upon the construction given to the language of the statute. The government has been told by Federal courts on many occasions that the statute here involved is not broad enough to cover such a case as the one at bar. It should not now be heard to ask this court to stretch the law. There is no language in the 1916 Federal Estate Tax Act that would indicate Congress intended the law to have a retroactive application and to attach to transactions completed prior to the enactment of the statute.

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

Gould v. Gould, 245 U. S. 151.

"In case of doubt revenue statutes are construed against the government and in favor of the citizen."

United States v. Hurst, 2 Fed. (2d) 73.

"No construction should be given a statute which would make its application impracticable, unfair or unreasonable."

Estate of Mary Emilie Parrott, 72 Cal. Dec. 108.

"The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. * * *"

Wilkinson v. Mutual Building and Savings Association, decided by Circuit Court of Appeals, Seventh Circuit, June 2, 1926.

"Statutes levying taxes are not to be extended by implication beyond the clear import of the language used. "

United States v. Merriam, 68 Law Ed. 48.

Congress Is Without Power to Measure Its Estate Tax on a Present Particular Occasion by Past Transactions Consummated Prior to the Adoption of the 1916 Revenue Act.

In considering the cases cited by the government, attention must not be directed from the fact that we are not here dealing with *transfers* taking effect at death or with a transaction where the enjoyment of property has been deferred in the grantor until death. Further that the question here presented must be determined by the Revenue Act of 1916, which Act the highest court of the nation has construed as not being retrospective. Cases in which the 1918 or 1921 Acts have been adjudged as applying to past transactions are not authority here, for Congress in 1918 amended the Revenue Act that its provisions might attach to transfers whenever made providing the decedent died after the amendment.

The government makes reference to the case of *Safe Deposit & Trust Company v. Tait,* 295 Fed. 429, contending that this case is authority for their right to tax transactions completed before the adoption of the law. In this case, the decedent died March 19, 1919, therefore it is not wholly in point here. We do, however, believe that the following language from the opinion fully sustains out contentions in the instant case:

> "It is contended that the deed of trust created an equitable tenancy by the entirety in Mr. and Mrs. Albert. The decision of Shwab v. Doyle, 258 U. S. 529, 42 Sup. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454, is conceded by the government to be decisive, if such a tenancy was created. Since section 402, subd. 'd', subjecting such an interest to the tax, has no clear statement to the effect that it applies to tenancies created before the act, it must be held to apply only to those created after the act.
>
> "A tenancy by the entireties is created by a conveyance to husband and wife, whereupon each becomes seized and possessed of the entire estate, and after the death of one of the survivor continues to take the whole."

The cases of

> *Walker v. Grogan,* 283 Fed. 530, and
> *Knox v. McElligott,* 258 U. S. 546,

are not controlling, since in each case at the time of the creation of the tenancy the deceased was the owner of all the created joint tenancy estate. Further the question as to when the *transfer* took effect or if any part of the joint tenancy was taxable upon the death of a cotenant was not litigated, since for some undisclosed

reason the taxpayers voluntarily included in its return for tax one-half interest in the joint tenancy. The language of Mr. Justice McKenna in *Knox v. McElligott* plainly forecloses the government from assessing a tax on any portion of a joint tenancy created prior to the enactment of the statute (except with the consent of the taxpayer).

> "It is true §201 provides that the tax is imposed upon the transfer of the net estate of 'every decedent dying after the passage of this act;' but the assumption must be that this relates to estates thereafter created, and not to then-existing property." * * *
>
> "From the structure of the act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had, in his lifetime. * * *"

In *Walker v. Grogan,* which arose in the state of Michigan, no consideration was given in the opinion to the statutory law or decisions of the courts of Michigan. Whether or not no additional interest passed to the surviving tenant under the Michigan law upon the death of a co-tenant, as is the case under the California law, we are not advised.

In a recent opinion the Circuit Court of Appeals, Second Circuit, said:

> "Where decedent, 12 years before his death, transferred securities then valued at $200,000 to trustees of his deceased wife's estate, by the use of which the trustees at the time of decedent's death had accumulated securites worth $500,000, *held,*

such $500,000 was not to be included as part of decedent's gross estate, taxable under Revenue Act 1921, §§401, 402 (Comp. St. Ann. Supp. 1923, §§6336¾b, 6336¾c), since such construction would render section 402 unconstitutional."

Frew v. Bowers, supra.

"No language, however, was inserted in the Revenue Act of 1918 to indicate that section 402(d)" (being the same as section 202(c) of the 1916 Act) "was intended to apply retroactively. A statute should not be given a retroactive operation unless its words make that imperative."

Appeal of Hannah M. Spofford, Decision No. 1311, Board of Tax Appeals.

The District Court of Massachusetts held the retroactive provisions of section 402(c) of the 1918 Revenue Act unconstitutional.

"The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death, because both are transfers in the nature of testamentary dispositions, and could be easily resorted to for the purpose of evading the tax. *I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer if completed before the effective date of the law."*

Coolidge v. Nichols, 4 Fed. (2d) 112.

The theory advanced by the Government to sustain its tax in the instant case that it may place any reasonable

burden on the privilege of succession and that a death duty statute can properly include such joint tenancy property as a measure of the tax payable by the estate for the decedent's privilege of disposing of his property by will or intestacy, was repudiated in the appeal of the case of

McElligott v. Kissam, 275 Fed. 545,

this being the theory adopted by the Circuit Court of Appeals for its decision, but the case was reversed and the theory nullified by the United States Supreme Court. See

Knox v. McElligott, supra.

Although this identical question has been before the state and Federal courts on innumerable occasions, we are unable to find any case that would warrant the Federal government in assessing a tax under the Revenue Act of 1916 on property which had absolutely vested prior to the enactment. In the case of

Blount v. United States, 59 Court of Claims, 328,

which has to do more particularly with a tenancy by the entirety, which system of property tenure is not recognized by the California Codes, the court held that the 1916 Revenue Act could not attach to a tenancy by the entirety or to a joint tenancy created prior to the enactment. At page 347, the court says:

> "It follows that the tax should not be assessed against the estate of tenants by the entirety because the wife did not take as upon a transfer from the husband at his death, but took under the original grant, his estate ceasing. We think it doubtful

whether subdivision (c) of section 202 contemplates estates by the entirety in their technical sense. It speaks of an interest held jointly, or as tenant in the entirety by the decedent, 'and any other person'. Only an estate held by the husband and wife could be held by the entirety. It seems to us this language applies to an interest that passes as part of the estate; that is, an estate held jointly or *per my et per tout,* by the moiety and by the whole. Giving effect to the stipulation as to the character of the estate, the plaintiff should recover the amount of the tax collected by the commissioner upon the lands conveyed to the husband and wife, except as it is affected by her return."

The case of *Lewellyn v. Frick,* 268 U. S. 934, involved the taxability of certain life insurance policies taken on the life of the late Henry C. Frick before the date of the statute, some of the policies were payable to his estate, all premiums were paid by Mr. Frick, there was unquestionably a *cessation of interest* upon his death and the beneficiaries received the principal of the policies by reason of the death. We find on page 6 of the government's brief:

> "Since, however, the statute is founded not upon the acquisition of rights by the decedent, *but the cessation of his rights at death.* * * *"

What is the distinguishing features that would cause a tax to attach because of a *cessation of interest* upon the death of a co-tenant, where under a state law all rights and interest in a joint tenancy estate are fixed and vested by the original grant and not altered by the

death of such co-tenant and exempt from the Act a policy of insurance payable to an estate and solely during life under the control of deceased, the interest in which is dependent and in so far as the estate is concerned fixed and vested only at death? We find in the opinion of Mr. Justice Holmes in the Frick case:

> "In view of their liability, the objection cannot be escaped by calling the reference to their receipts, a mere measure of the transfer tax. The interest of the beneficiaries is established by statutes of the states controlling the insurance, and is not disputed. * * *"

> "There would be another if the provisions for the liability of beneficiaries were held to be separable, and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind. Panama R. Co. v. Johnson, 264 U. S. 375, 390, 68 L. Ed. 748, 754, 44 Sup. Ct. Rep. 391. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways. * * *"

The expression of the United States Supreme Court is in unmistakable language concerning the theory here advanced by the government.

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact. * * *"

"But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it. * * *"

"We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of Congress, and have resolved that it should be not construed to apply to transactions completed when the act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative, and this cannot be said of the words of the Act of September 8, 1916."

Shwab v. Doyle, supra;

Union Trust Company v. Wardell, 258 U. S. 535;

Levy v. Wardell, 258 U. S. 541.

The principle here at issue is ably treated in the chapter on Joint Estates beginning at page 150, in the 1926 publication of Pinkerton & Millsaps on the subject of Inheritance and Estate Taxes. At page 152 we find the following:

"§192. Theories of Inheritance Taxation. There are four theories in regard to the levying of death duties upon the vesting of title in the survivor at the death of a joint tenant. These are as follows:

(1) That the property passed at the time of the creation of the joint estate and consequently already belonged to the survivor, the transfer being, therefore, not taxable.

(2) That each of the joint tenants has an interest in the property to the extent of an equal share with each of the other joint tenants (a one-half interest in the case of each of two), and that the transfer of the other fractional part is therefore taxable.

(3) That each of the joint tenants had an interest in the property to the proportionate extent to which he contributed to its cost, and that the transfer of the other part is therefore taxable.

(4) That the survivor acquires undisputed title to the property by virtue of the death of the other joint tenant, and that the transfer is therefore taxable in full."

In paragraph 1 above, it may be noted that the author specifically exempts from tax joint tenancies where the law provides that the vesting of title is concluded at the time of the creation of the tenancy.

In conclusion, the right of the government to exact a tax is prohibited by the Constitution of the United States, (a) as an unlawful interference with the rights of the states to regulate descent and distribution; (b) an unjustifiable taking of private property without due process of law; (c) the exaction of a tax upon property of one person because of the death of another; (d) a direct tax not laid in proportion to the census and enumer-

ation of the states; (e) a taking of private property for public purposes without just compensation; (f) the measure of the tax would produce profound inequality between surviving joint tenants who were beneficiaries of an estate and surviving joint tenants who were not beneficiaries. It is submitted that the tax liability determined by the Commissioner of Internal Revenue in the instant case was unlawful, not within the provisions of the Federal Estate Tax Act and contrary to the expressed inhibitions of the Constitution of the United States, and therefore the judgment should be affirmed.

Respectfully submitted,

CLAUDE I. PARKER and
RALPH W. SMITH,
Attorneys for Defendants in Error.

Dated: September 29th, 1926.

No. 4839

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHAN HAI,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4839

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

HUGH C. TODD, Esquire, Attorney for Appellant,
323 Lyon Building, Seattle, Washington.

THOMAS P. REVELLE, Esquire, Attorney for Appellee,
310 Federal Building, Seattle Washington.

C. T. McKINNEY, Esquire, Attorney for Appellee,
315 Federal Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 10,408.

In the Matter of the Application of CHAN HAI for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

Comes now Chan Hai, and petitions this Court to issue a writ of habeas corpus to inquire into the cause of the detention of said petitioner by Honorable Luther Weedin, Commissioner of Immigration, at Seattle, Washington, and shows to this Court as follows:

I.

That your petitioner Chan Hai is a citizen of the Philippine Islands, of Chinese descent, and applied for admission to the United States from the Philip-

*Page-number appearing at the foot of page of original certified Transcript of Record.

pine Islands as a Section Six Merchant and member of an exempt class of Chinese persons, as set forth in the treaties and laws relating to the admission of Chinese merchants to the United States, and is now detained at the United States Immigration Station, at Seattle, Washington, by Hon. Luther Weedin, Commissioner of Immigration, in the proceedings from his application to be admitted to the United States.

II.

That the above-named petitioner is imprisoned and restrained of his liberty by the said Commissioner of Immigration of said Immigration Detention Station; that he is not committed and is not detained by virtue of any judgment, decree, final order or process issued by a Court or Judge of the United States, in a case where such Courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by commencement of legal proceedings in such a court, nor is he detained by virtue of the final [2] judgment or decree of a Court or competent tribunal of civil or criminal jurisdiction or the final order of such tribunal made in the special proceedings instituted for any cause except to punish him for contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order; or by virtue of a warrant issued from any court upon an indictment or information.

III.

That the cause or pretense of the imprisonment and restraint of the said petitioner is that the said Com-

missioner ruled that the said petitioner is an alien Chinese person, ineligible to citizenship under Section 13, Subdivision "C" of the Immigration Act of 1924, not being a member of any of the exempt classes of Chinese entitled to come into or remain in the United States, and accordingly denied him admission, from which findings an appeal was taken to the Secretary of Labor, which said appeal was thereafter dismissed by the Secretary of Labor.

IV.

That the above-named immigration officials have misapplied the law applicable in this case in their decision excluding said petitioner.

V.

That the immigration records in regard to the application of said petitioner to be admitted to the United States as a Section Six Merchant show that he is a citizen of the Philippine Islands, of Chinese descent, having applied for admission to the United States upon his arrival at the Port of Seattle on the S. S. "President McKinley," January 11, 1926, presenting as evidence of his right to be admitted a Section Six Certificate issued to him by the Collector of Customs for the Philippine Islands at Manila, September 19, 1925, bearing the photograph of said petitioner, said certificate being signed and sealed by the Insular Collector of Customs, Manila, Philippine Islands, [3] which certificate is in proper form and the certificate provided by law as the sole evidence of his right to be admitted to the United States as a Section Six Merchant, being a person of Chinese descent; and that the petitioner

is the identical person to whom said certificate was issued, and that the truth of the facts therein set forth were examined into and verified under seal by said Collector of Customs, as provided by law, which certificate has not been controverted or the facts therein stated disproved.

VI.

That the evidence presented and testimony taken at petitioner's hearing before the immigration officials at Seattle established the above and foregoing facts, and there is no evidence or testimony to the contrary; that said decision is arbitrary and contrary to law; that there is absolutely no evidence in the record to disprove the right of this petitioner to be admitted into the United States; and that said decision, aside from being contrary to law and treaty, shows that said immigration officials greatly abused their discretion holding that said petitioner was not entitled to be admitted to the United States.

VII.

That the above-named petitioner is being restrained of his liberty without due process of law, in violation of the provisions of the Constitution of the United States and the laws and treaties governing such cases made and provided; that he is wrongfully, illegally and arbitrarily restrained of his liberty, and that said immigration officials are about to deport him, and that unless this Court intervenes he will be deported forthwith. [4]

WHEREFORE, your petitioner prays that a writ of habeas corpus may issue, directed to the Hon. Luther Weedin, Commissioner of Immigration, at

Seattle, Washington, commanding him to have the body of said petitioner before Honorable Jeremiah Neterer, Judge of the United States District Court, Western District of Washington, Northern Division, at the Federal Building, Seattle, Washington, at such time as in said writ may be named, to do and receive what shall then and there be considered concerning said petitioner, together with the time and cause of such detention; and

Further, that an order to show cause be issued by said Court ordering the said Honorable Luther Weedin, Commissioner of Immigration at Seattle, Washington, to appear and show cause on the 8th day of March, 1926, at 2:00 o'clock P. M., why said writ should not issue, and to do and receive what shall then and there be considered concerning the said petitioner with the time and cause of his detention.

Dated at Seattle, Washington, February 26, 1926.

CHAN HAI,
Petitioner.

HUGH C. TODD,
Attorney for Petitioner.

State of Washington,
County of King,—ss.

Chan Hai, being first duly sworn, through interpreter, on oath deposes and says; that he is the petitioner in the above-entitled matter; that he has read the above petition by and through an interpreter, knows the contents thereof, and believes the same to be true.

CHAN HAI.

Subscribed and sworn to before me this 26th day of February, 1926.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Feb. 26, 1926. [5]

POSTAL TELEGRAPH—COMMERCIAL CABLES.

SFB63 25 Collect Cable. 1926 Mar. 5 PM 8 26
Manila.
Attorney Todd 626
Seattle
Original section six merchant cer*i*ficate issued
a
Chan Hoi, September Nineteen last year deliver*e*d*d*
him Duplicate on file bearing signature his hand-
writing

ALDANESE.

[Endorsed]: Filed Mar. 15, 1926. [6]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

On reading and filing the petition of Chan Hai, duly signed and verified, whereby it appears that the above-named applicant is wrongfully and illegally imprisoned and restrained of his liberty by Honorable Luther Weedin, Commissioner of Immigration at Seattle, Washington, and stating wherein

the illegality exists, from which it appears that a writ of habeas corpus to issue;

NOW, THEREFORE, it is by this Court

ORDERED, ADJUDGED and DECREED that the said Luther Weedin be required to appear before me in the courtroom of said Court on the 8th day of March, 1926, at two o'clock P. M., of said day, to show cause, if any he have, why the writ of habeas corpus should not be issued as prayed for in the petition on file herein, together with the time and cause of the detention of said applicant; and it is hereby

FURTHER ORDERED that the said Commissioner of Immigration shall retain custody of said applicant until the further order of this Court, provided that the applicant herein deposit funds to pay the maintenance of said applicant while so detained in the Immigration Station.

Dated this 26th day of February, 1926.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Feb. 26, 1926. [7]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Luther Weedin, by handing to and leaving a true

and correct copy thereof with him at Seattle in said District on the 26th day of Feby, A. D. 1926.

E. B. BENN,
U. S. Marshal.
By E. Laird,
Deputy.

[Endorsed]: Filed Feb. 26, 1926. [8]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington.

Comes now the respondent, Luther Weedin, United States Commissioner of Immigration at Seattle, Washington, and, for answer and return to the order *you* show cause entered herein, certifies that the said Chan Hai was detained by this respondent at the time he arrived at the port of Seattle, Washington, to wit: January 11, 1926, as an alien Chinese person not entitled to admission to the United States under the laws of the United States, pending a decision on his application for admission as a Section Six Merchant and citizen of the Philippine Islands; that, at a hearing before a Board of Special Inquiry at the Seattle Immigration Office, the said Chan Hai was unable to furnish satisfactory proof that he was entitled to admission to the United States under the status claimed, and his application for admission was denied for that

reason; that the said Chan Hai appealed from the decision of the Board of Special Inquiry to the Secretary of Labor and thereafter the decision of the Board of Special Inquiry was affirmed by the Secretary of Labor; that, since the final decision of the Secretary of Labor, this respondent has held, and now holds and detains, the said Chan Hai for deportation from the United States as a person not entitled to admission to the United States under the laws of the United States, and subject to deportation under the laws of the United States. [9]

The original record of the Department of Labor, both on the hearing before the Board of Special Inquiry at Seattle, Washington, and on the submission of the record on the appeal to the Secretary of Labor at Washington, D. C., in the matter of the application of Chan Hai for admission to the United States, is hereto attached and made a part and parcel of this return as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a writ of habeas corpus be DENIED.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at Seattle, Washington, and the respondent named in the foregoing return; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 10 day of March, 1926.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Endorsed]: Filed Mar. 12, 1926. [10]

[Title of Court and Cause.]

DECISION.

Filed March ——, 1926.

The petitioner, an infant 19 years of age, an orphan, born in China of a Chinese father and a Filipino mother, a resident of Manila, Philippine Islands after March 8, 1925, seeks admission to the United States as a merchant and presents a certified copy of Section Six Chinese Exclusion Act Certificate duly issued. He was denied admission. He says a fair trial was denied him.

He possesses exchange in the sum of One Thousand Dollars, but has no other funds. He claims to be engaged in the exporting and importing business in Manila with his six brothers, the oldest of whom is 26 years and the youngest 17 years of age, since April 1st, 1925. The estimated value of the business is about Six Thousand Dollars. The One Thousand Dollars is income from his salary. His total financial worth is "a little over Two Thousand Dollars Gold." The value of the business at the time the certificate was issued in September, 1925, he says, was a little over Five Thousand Dollars in

gold. The original contribution to the capital of the concern was a little over Two Thousand Dollars. Before leaving China for Manila, he sold some property for Six or Seven Hundred Dollars, and one of his brothers gave him the balance of the money to make up the sum contributed to the business. Three brothers were denied admission. The testimony in those hearings, which is made a part of this hearing, disclosed that the brothers on arrival had in their possession $45.00, $40.00, and $13.00, respectively. Each claimed to be working in stores—one in a grocery store, one in a hardware store, and one is a general worker in a store. The petitioner says he was sometimes head bookkeeper, sometimes assistant. He has no friends or acquaintances in this country, is an utter stranger, has had no correspondence with anyone with relation to business or otherwise.

HUGH C. TODD, Esq., Attorney for Petitioner.

C. T. McKINNEY, Esq., U. S. Asst. Dist. Atty., Attorney for United States.

JEREMIAH NETERER, District Judge.

I think there is evidence that the certificate, waiving the fact that it is a certified copy, has been fairly contradicted. The term "merchant" has a definite meaning. It has been defined to be strictly a buyer, but by extension, includes one who sells. [11] Kinney, Law Dict. and Glos. 459. A merchant is one who traffics or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale, Webster Dict.; Bou-

vier's Law Dict. A person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who during the time does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. Tom Hong vs. U. S., 193 U. S. 517. To buy and sell a person must be competent to contract and to carry forward the business and qualified to meet the exigencies of trade. An infant is incompetent to contract, except for the necessaries of life. The incapacity to contract bars ratification of it. The fact that an infant undertakes to trade or engage in business for himself does not cure his incapacity. Sanger vs. Hibbard, 104 Fed. 455. While an infant may become a partner with an adult, such an agreement is voidable at his election. Continental National Bank vs. Strauss, 137 N. Y. 148.

I believe a fair construction of the treaty provision implies persons competent to carry on the business of marchant or trader in the usuel fashion without legal impediment. There is evidence in the case to sustain the Department that the petitioner has not qualified under Section Six of the Exclusion Act and, if admitted, would likely become a public charge. Writ denied.

NETERER,
United States District Judge.

[Endorsed]: Filed Mar. 22, 1926. [12]

[Title of Court and Cause.]

ORDER DENYING WRIT.

The above-entitled matter having come on for hearing before this Court on the 15th day of March, 1926, on the return of the Commissioner of Immigration to the order to show cause herein, respective parties being represented by attorneys of record, and the Court being fully advised in the premises did this day sign and enter herein his written opinion denying the petition for the writ of habeas corpus:

NOW, THEREFORE, it is by this Court ORDERED, ADJUDGED, and DECREED that the writ of habeas corpus as prayed for herein be and the same is hereby denied; provided however that petitioner may within five days file notice of appeal, and in the event appeal is taken, deportation shall be stayed pending the determination of said appeal; provided also that petitioner's maintenance at the immigration station be provided for while he is detained therein under these proceedings.

Done in open court this 22d day of March, 1926.

JEREMIAH NETERER,
District Judge.

O. K.—HUGH C. TODD,
Attorney for Petitioner.

[Endorsed]: Filed Mar. 22, 1926. [13]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Luther Weedin, United States Commissioner of Immigration for the Port of Seattle; and to Thos. P. Revelle and C. T. McKinney, His Attorneys:

YOU, AND EACH OF YOU, are hereby notified that Chan Hai, appellant above named, hereby and now appeals from that certain order, judgment and decree made herein by the above-entitled court on the 22d day of March, 1926, adjudging, holding, finding and decreeing that the above-named petitioner be denied a writ of habeas corpus, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

HUGH C. TODD,
Attorney for Appellant.

Service accepted 3/27/26.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 27, 1926. [14]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Chan Hai, the appellant above named, deeming himself aggrieved by the order and judgment entered herein on the 22d day of March, 1926, does hereby appeal from the said order and judgment

to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon which said order and judgment is made, fully authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States.

HUGH C. TODD,
Attorney for Applicant.

Service accepted 3/27/26.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 27, 1926. [15]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding and deciding that a writ of habeas corpus should be denied appellant herein.

II.

The Court erred in holding and deciding that the petitioner herein, a citizen of the Philippine Islands, of Chinese descent, and a domiciled merchant of Manila, presenting a Section Six Merchants Certificate issued to him by the proper Government official of the Philippine Islands, under seal, after verifying the truth of the statements set forth in said certificate, is not entitled to be admitted to the

United States under the Chinese Exclusion Law, even though identified as the proper holder thereof.

III.

The Court erred in holding and deciding that the petitioner's Section Six Certificate had been contradicted, for the reason that petitioner is nineteen years of age and not an adult.

IV.

The Court erred in holding and deciding that petitioner had not qualified under Section Six of the Chinese Exclusion Law, and that if admitted he would likely become a public charge.

HUGH C. TODD,
Attorney for Applicant.

Service accepted.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 27, 1926. [16]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon the filing and reading of the petition for appeal in the above-entitled matter, and the Court being fully advised in the premises, it is

HEREBY ORDERED that the appeal be allowed as prayed for.

Done in open court this 27th day of March, 1926.

JEREMIAH NETERER,
District Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 27, 1926. [17]

[Title of Court and Cause.]

STIPULATION RE TRANSMISSION OF ORIGINAL IMMIGRATION RECORD AND FILE OF DEPARTMENT OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between Hugh C. Todd, Esquire, attorney for petitioner above named, and Thos. P. Revelle, Esquire, and C. T. McKinney, Esquire, attorneys for respondent, Luther Weedin, United States Commissioner of Immigration, that the original file and record of the Department of Labor covering the proceedings against the petitioner above named, which was filed with the respondent's return to the order to show cause in the above-entitled cause, may be by the Clerk of this court sent up to the Clerk of the Circuit Court of Appeals, as a part of the appellate record, in order that the said original immigration file may be considered by the Circuit Court of Appeals, in lieu of a certified copy of said record and file, and that said origi-

nal records may be transmitted as part of the appellate record.

HUGH C. TODD,
Attorney for Petitioner.
THOS. P. REVELLE,
United States Attorney.
C. T. McKINNEY,
Assistant United States Attorney.

[Endorsed]: Filed April 6. 1926. [18]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD OF DEPARTMENT OF LABOR.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, Chan Hai, which was filed with the respondent's return in the above-entitled cause, directly to the Clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done in open court this 12th day of April, 1926.

JEREMIAH NETERER,
United States District Judge.

Service accepted 4/6/26.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Apr. 12, 1926. [19]

[Title of Court and Cause.]

PRAECIPE OF APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled case for appeal of the said appellant, heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Return to order to show cause.
4. Decision of Honorable Jeremiah Neterer denying writ, filed March 22, 1926.
5. Order denying writ.
6. Petition for appeal.
7. Notice of appeal.
8. Order allowing appeal.
9. Assignment of errors.
10. Citation.
11. Stipulation.
12. Order for transmission of original record.

13. Cablegram.
14. This praecipe.

HUGH C. TODD,
Attorney for Appellant.

[Endorsed]: Filed Apr. 6, 1926. [20]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 20, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certifi-

cate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [21]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return 47 folios at 15¢ $7.05

Certificate of Clerk to transcript of record, with seal ..... .50

Certificate of Clerk to original exhibits, with seal ..... .50

Total $8.05

I hereby certify that the above cost for preparing and certifying record, amounting to $8.05 has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15th day of April, 1926.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [22]

[Title of Court and Cause.]

CITATION.

United States of America,—ss.

To the Honorable LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, Washington, GREETING:

WHEREAS, Chan Hai has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment, order and decree lately, on, to wit, on the 22d day of March, 1926, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that the writ of habeas corpus as prayed for in the petition herein be denied.

You are therefore cited to appear before the United States Circuit Court of Appeals, in the City of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

GIVEN under my hand in the City of Seattle, in the Ninth Circuit, this 12th day of April, in the year of our Lord nineteen hundred and twenty-six, and of the Independence of the United States the one hundred fiftieth.

[Seal] JEREMIAH NETERER,
United States District Judge.

Service accepted 4/6/26.

C. T. McKINNEY,
Asst. U. S. Atty. [23]

[Endorsed]: Filed Apr. 12, 1926. [24]

[Endorsed]: No. 4839. United States Circuit Court of Appeals for the Ninth Circuit. Chan Hai, Appellant, vs. Luther Weedin, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 17, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4839

CHAN HAI, Appellant

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant

HUGH C. TODD
Attorney for Appellant
323-325 Lyon Building, Seattle, Washington

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4839

CHAN HAI, Appellant

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant

STATEMENT

This is an appeal from an order denying a petition for a writ of habeas corpus. The appellant applied for admission to the United States, basing his application on a Chinese Section 6 merchant's certificate issued pursuant to Section 6 of the Act of 1882

(22 Stat. 60), entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese," as amended by the Act of July 5, 1884 (23 Stat. 116).

The appellant, Chan Hai, is a merchant engaged in business in Manila. He is a citizen of the Philippine Islands of Chinese descent. In order to be admitted to the United States he is required to present the same certificate as though he were a resident of China. The Act of Congress approved April 29, 1902, (32 Stat. 176) extended the Chinese Exclusion Law to the Philippine Islands, so that citizens of the Philippine Islands of Chinese descent, being merchants and residing in the islands, must present at the port of entry in the mainland a certificate conforming to the regular Section 6 merchant's certificate. The latter act provides: "* * * and said laws shall also apply to the island territory under the jurisdiction of the United States."

Pursuant to said Act, the Department of Labor issued Rule 11 (a), as follows:

"Chinese persons of the exempt classes who are citizens of other insular territory of the United States than the Territory of Hawaii shall, if they desire to go from such insular territory to the mainland or from one insular territory to another, comply with the terms of Section 6 of the Act approved July 5, 1884. The certificate prescribed by said section shall be granted by officers designated for that pur-

pose by the chief executives of such insular territories, and the duties thereby imposed upon the United States diplomatic and consular officers in foreign countries in relation to Chinese persons of said classes shall be discharged by the officers in charge of the enforcement of the Chinese Exclusion Acts at the ports, respectively, from which any members of such excepted classes intend to depart from any insular territory of the United States."

Co-operating with said rule the civil government of the Philippine Islands, on September 23, 1904, in Executive Order No. 38, designated the Collector of Customs for the Philippine Islands as the proper officer to issue such Section 6 certificates to citizens of the Philippine Islands of Chinese descent. Said executive order No. 38 in this respect provides:

"The Collector of Customs for the Philippine Islands is hereby designated to grant such permission in the name of the government of the Philippine Islands to all such Chinese persons as shall have duly established to his satisfaction their eligibility under the law to enter the mainland territory of the United States or any other of its insular possessions.

"This permission, and the prima facie establishment of the facts showing eligibility, shall be evidenced by a certificate signed and approved by him in analogy to the certificate required by section six of the act of Congress of July 5, 1884, and referred to in the rule above cited."

The appellant arrived at the Port of Seattle January 11, 1926, and presented to the proper immigration authorities a certificate mentioned in the acts above, which certificate contained all the information required, and was vised by the Collector of Customs for the Philippine Islands, that officer certifying that he had made a thorough investigation of the statements contained in the certificate and found them to be in all respects true. The statute provides that the certificate when vised as required is prima facie evidence of the facts set forth therein, and shall be produced to the proper immigration officials at the port of entry in the United States, and afterwards produced to the proper authorities of the United States when lawfully demanded and shall be the sole evidence on the part of those producing the same to establish a right of entry into the United States.

ARGUMENT

The only reason for denying the writ of habeas corpus by the District Judge is to be found in his written decision filed March 22, 1926, in which it is stated that as the appellant is nineteen years of age and is an infant in law, he was not entitled to have a Section 6 certificate issued to him by the Collector

of Customs for the Philippine Islands. This point will be discussed later.

The immigration officials at the Port of Seattle, however, urged two other points against appellant's right to be admitted. The first point mentioned is that the Section 6 certificate presented by the appellant was a certified copy, but the Secretary of Labor at Washington, in passing on the appeal, found that the certificate was sufficient under the law, and the Secretary of Labor's certified record will disclose the following decision on that particular point:

"On this point it was found, however, that the Collector of Customs at Manila has certified that the original certificate issued on September 19th last is on file in the Customs House at Manila."

The District Judge also, in his opinion above mentioned, waives this point and states that he "presents a certified copy of Section 6 Chinese Exclusion Act Certificate, *duly issued.*" It is admitted in the record that the original Section 6 certificate is on file with the Collector of Customs in Manila, and that the certificate presented by the appellant is a copy of the same bearing the photograph of the appellant and certified under the seal of the Collector of Customs as having been issued to the appellant, the proper holder thereof. This is a mere technicality, which does not go to the substance of his status as a merchant, and on

this point the District Court, in 100 Fed. 609-11, said: "Nevertheless if he were in fact entitled to come here, the courts might be astute to find some way to avoid merely formal defects in his certificate."

The immigration officials at Seattle have rejected certain brothers of appellant who arrived with certificates showing that they were citizens of the Philippine Islands of Chinese descent, and stated that as his brothers were not entitled to be admitted to the United States, the appellant likewise was not entitled to be admitted. This reasoning is erroneous, for the reason that his brothers who had previously been denied admission did not present Section Six Merchant's Certificates as did the appellant, but presented only certificates showing that they were citizens of the Philippine Islands of Chinese descent, and under the *Palo* decision, 8 F. (2d) 607, this court held that a citizen of the Philippine Islands of Chinese descent was not entitled to be admitted to the United States, simply upon proof of Philippine citizenship. They have since returned to the Philippine Islands and have entered into business, but at the time they applied for admission they were laborers and did not present a Section 6 Merchant's Certificate and were properly denied admission.

THE SOLE QUESTION HERE

The sole question for this court to decide in this case is the point raised by the District Judge in his decision of March 22, 1926. The lower court denied the writ on one ground only. In a few words, the Court there practically stated that as the appellant is nineteen years of age, and not twenty-one, he is an infant in law and is incapable of becoming a merchant if admitted into the United States. The lower court mentions two decisions, but those two decisions are not applicable to the question of the right of appellant to be admitted into the United States. Those decisions simply hold what is recognized to be the law, that an infant may make an agreement which is voidable at his election. The lower court then reasons that the treaty provisions between the United States and China in regard to the admission to this country of merchants of Chinese descent contemplated that only adults were entitled to receive such certificates.

This reasoning goes to a long way around for the purpose of upholding the exclusion decision in this case. In the first place, there is nothing in the treaty between China and the United States or in the law passed to execute the stipulations of said treaty which

states that the applicant for Section Six Certificate shall be twenty-one years of age or over.

The treaty with China and the acts passed to execute the stipulations of that treaty in regard to Chinese merchants show that Chinese merchants are entitled to have Section Six Certificates issued to them, and that such merchants, if they "buy and sell goods at a fixed place of business," are on presentation of such certificates entitled to be admitted to the United States; and said treaty and laws say nothing about whether such merchants shall be minors or adults. The law requiring all Chinese laborers at a certain time to register did not say that if such laborers were minors they need not register, but simply used the word "laborers," which included both minors and adults, if not otherwise exempt.

In *U. S. vs. Joe Dick,* 134 Fed. 988, the court, discussing that point said:

"The Act says nothing about minors or adults. It is 'laborers' that are referred to; and the presumption is I think, that their age is a matter of no importance. Of course, the statute is to receive a reasonable construction."

So then the statute defining a merchant should receive a reasonable construction. If a merchant comes here with a Section Six certificate, and he is nineteen or twenty years of age, there is nothing in the

statute that would cause his rejection on account of his minority. He is a merchant in the country from which he came, and although nineteen years of age can engage in business in the United States without any restriction except the law of the land which protects the merchant himself in his minority.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression, or an absurd consequence."

U. S. vs. Kirby, 7 Wall 482; 92 L. Ed. 278.

Holy Trinity Church vs. U. S., 143 U. S. 457; 36 L. Ed. 226.

In the case of *U. S. vs. Moy Nom*, 772 Fed. 249, the United States District Court states that there is nothing in the Chinese Exclusion Law to prevent the minor son of a Chinese merchant from acquiring his father's interest, either by gift or purchase, and becoming a merchant himself during his minority, and establishing an exempt status as a merchant, even though an infant. The Court there said:

"* * * that appellant, as son of his father, was entitled to enter and thereafter remain with him as one of the exempted class, during minority at least. * * * and if during that time the son succeeded to an interest of the father in the Hip Lung Company, either by purchase or gift from him, and engaged in the same business the father was engaged

in, no reason is perceived why he does not acquire the status of the father as one of the exempted class. He was lawfully in the United States, and might rightfully acquire property therein, of which he could not be deprived, except by due process of law."

This case, therefore, holds that a Chinese who is a minor may become a merchant and thus set up a separate status of the exempted class, and this in spite of his minority. Of course, the courts will be reasonable in construing this question, and a reasonable construction would not foreclose the appellant, who is nineteen, and will soon be twenty years of age, from being a merchant within the meaning of the Chinese Exclusion Law.

Said law and treaty only inquire whether an applicant for a Section Six Merchant's Certificate is a bona fide merchant in the country where he resided. The fact of the matter is that in China a person is an adult at eighteen years of age. But nevertheless, as stated above, the treaty and law require certain standards as a merchant, and the certificate issued in accordance therewith, in addition to other requirements, shall state the nature, character and estimated value of the business carried on by him prior to and at the time of his application to enter. The term "merchant," mentioned in the treaty, is defined by Section 2 of the Act of

November 3, 1893, (28 Stat. 7), as follows: "A merchant is a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The purpose of this law is to keep out Chinese laborers, and when a Chinese presents a Section Six Merchant's Certificate the law and the rules provide that he shall be admitted so far as the exclusion laws are concerned, simply upon identification as the proper holder of the certfiicate, unless it can be shown that the same was fraudulently issued. No question of fraud can be raised in this case.

The right of such a Chinese merchant to be admitted to the United States when presenting such a certificate rests on his status in the country from which he came and not on what he intends to do or cannot do upon arrival in the United States, except that if he is found to be a laborer after admission he may be arrested and ordered deported. The applicant is not required to immediately engage in business in the United States, and even if it were necessary for him to be twenty-one years of age to engage

in business as a merchant, he will soon be able to meet that requirement. He is entitled to be admitted in any event in the meantime, the only requirement of the law being that he does not become a laborer between the time of his admission and the time of his actually setting up a business in the United States. The law does not even require such a Section Six Merchant to engage in business in the United States, for if he be a merchant in the country from which he came and presents a Section Six Certfiicate he is entitled to be admitted to the United States, and if he does not become a laborer, and if he does not open up a mercantile business he still is entitled to reside in the United States, even if as a retired merchant.

But even aside from that question the appellant, though only nineteen years of age at the present time, is a merchant in the country from which he came, still maintaining an interest in that firm which he organized, which firm exports sugar to China and imports Chinese merchandise to the Philippine Islands; his Section Six Certificate certifies to the truth of these matters and his Section Six Certificate entitles him to be admitted to the United States. What he does when he comes here, in regard to his right to remain here, only interests the immigration officials in the event that he becomes a laborer. There is nothing in the decisions mentioned by the learned

court below to prevent this appellant, when admitted opening up a store of his own, or to prevent him from becoming a member of some already organized Chinese merchantile firm. This court will take judicial knowledge of the fact that the common method of Chinese doing business in this country is for several of them to associate together as partners, putting in from $500.00 to $1,000.00, or more, each, giving the business some Chinese firm name, and opening up a general Chinese mercantile establishment, which status is recognized in law to come within the meaning of a merchant as set forth in Section 2 of the Act of 1893, supra.

Weedin vs. Wong Tat Hing et al., 6 F. (2d) 201.

The fact that a minor engaged in business may repudiate some contract he enters into does not prevent him from engaging in business in this country and becoming a merchant. We all know of many American boys under twenty-one years of age in business for themselves who succeed and prosper, and are merchants. The fact that they may avoid some contract entered into is only a fact for a person who desires to sell his merchandise to the minor to consider, but if the seller desires to sell merchandise to a minor he may do so, and when the goods are purchased by the minor, the latter has an unques-

tioned right to sell them. The appellant will have no trouble securing merchandise from China for his establishment, and will have no trouble finding wholesalers in this country who will sell him their wares irrespective of the fact that he is a minor. There is no law in this country against a minor engaging in business and becoming a merchant, and the law defining a merchant admissible to the United States under the treaty and the laws states that he must be a "person engaged in buying and selling merchandise at a fixed place of business." The decisions mentioned by the learned court below do not hold that the minors therein mentioned are not merchants, but simply hold what is recognized to be the law that agreements made by minors are voidable at their election, and do not mean that an infant nineteen years of age may not engage in busiess for himself or become a merchant by joining some partnership or firm. This rule of law is for the protection of infants in making extravagant and unreasonable agreements and contracts injurious to their own welfare.

That being the only and sole question relied upon by the court below, it should appear to this court that the fact that appellant is a minor is not sufficient to bar him from admission to the United States, when it is shown that he is engaged in business as

a merchant in the country from which he came, that he still maintains his interest in that business which furnishes him an income, and that he is in possession of the sum of one thousand dollars, and that he expects to become a merchant here when admitted to the United States. The Court below fears that he might become a public charge, but this fear is based upon the Court's erroneous conclusion that appellant is incapable of becoming a merchant if admitted to the United States; but the fact that he still maintains his business in the country from which he came and still derives an income therefrom, and that he is equipped with funds with which to enter business in the United States answers that question. The fact that he is at present an infant in law does not prevent him from engaging in business in the United States as a merchant, although during his infancy, which he is about to throw off, being nearly twenty years of age, the law of this country permits him to void certain agreements. This latter state of the law, however, does not destroy his mercantile status in the country from which he came or prevent him from engaging in business in the United States as a merchant.

It is respectfully submitted that as the Collector of Customs of the Philippine Islands investigated the mercantile status of this appellant and satisfied him-

self that the applicant was a merchant and issued to him the certificate required by law, certifying that the appellant was engaged in business in the country from which he came, and as the appellant is the identical person to whom said certificate was duly issued, and as he is equipped to engage in business in the United States and still maintains his interest in his business in the country from which he came, he qualifies as a merchant under the treaty and the law, and is entitled to be admitted to the United States upon his Section Six Merchant's Certificate, which has not been controverted.

Respectfully submitted,

HUGH C. TODD,
Attorney for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4839

CHAN HAI, Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the port of Seattle, Washington, Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

THOS. P. REVELLE,
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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4839

CHAN HAI, Appellant,

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LUTHER WEEDIN, as Commissioner of Immigration at the port of Seattle, Washington, Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

STATEMENT OF THE CASE

The appellant, Chan Hai, arrived at the Port of Seattle, Washington, January 11, 1926, on the steamer "President McKinley," and applied for admission to the mainland of the United States as a merchant of Manila, P. I. He was accorded various hearings before a Board of Special Inquiry at the Seattle Im-

migration Office and, on January 20, 1926, was denied admission under the Chinese Exclusion Law and for the additional reason that he was an alien ineligible to citizenship, not admissible under Section 13(c) of the Immigration Act of 1924. Thereafter an appeal was taken from this decision of the Board of Special Inquiry to the Secretary of Labor at Washington, D. C., his appeal was dismissed and he was ordered deported. Thereafter a petition for a writ of habeas corpus was filed in the United States District Court for the Western District of Washington, Northern Division, which petition was denied by said court. The case now comes before this court on appeal from that decision.

ARGUMENT

Counsel for the appellant sets up the claim that the sole question for this court to decide is the point mentioned by the District Judge in his decision denying the writ, i. e., the infancy of the appellant and his consequent incapacity to become a merchant in this country, if admitted. This claim by counsel is, of course, not well founded, as it was not necessary for the District Court to mention in its decision every point raised in the case, and the fact that said court did not do so does not preclude this court from passing upon other questions.

There Are Several Questions Involved in This Case

I. Does the paper presented by the appellant comply with the law, even if issued by proper authority?

II. Was the paper presented by appellant issued by proper authority?

III. Is the appellant an alien ineligible to citizenship, not admissible under Section 13 (c) of the Immigration Act of 1924?

IV. Has the paper presented by the appellant been controverted?

V. Is the appellant entitled to be classed as a "merchant"?

I.

Section 6 of the Act of 1882-1884 (23 Stat. L. 117, Chap. 220) provides:

"That in order to the faithful execution of the provisions of this Act, every Chinese person other than a laborer, who may be entitled by said treaty or this Act to come within the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall

show such permission, *with the name of the permitted person in his or her proper signature.*" (Italics ours.) * * *

The paper presented by the appellant purports to be a certified copy of an original certificate which is on file in the Manila Custom House. It does not show the appellant's signature and, therefore, does not comply with the law.

The courts have held that a Section 6 certificate must comply strictly with the requirements of the statute.

U. S. vs. Pin Kwan, 100 Fed. 609, 40 C. C. A. 618;

Cheung Pang vs. United States, 133 Fed. 392.

II. AND III.

The Acts of April 29, 1902, and April 27, 1904, (32 Stat. L. 176 and 33 Stat. L. 394) extended the above-quoted provisions to insular territory under the jurisdiction of the United States and provide that the Section 6 certificate prescribed by the Act of 1882-1884 shall be granted by officers designated for that purpose by the chief executives of such insular territories. In executive order No. 38, issued by the Civil Government of the Philippine Islands September 23, 1904, the Collector of Customs for the Philippine

Islands was designed as the proper officer to issue such Section 6 certificates to *citizens of the Philippine Islands of Chinese descent.* (Italics ours.) Rule 11 of the Rules Governing the Admission of Chinese designates the Chinese Consul General at Manila as the official empowered to issue such certificates to *citizens of the Chinese Republic* residing in the Philippines.

The appellant stated that he was born in China and that his father was of the Chinese race and his mother a Filipino woman; that his father died in China sixteen years ago; that his mother went from China to Manila in 1912, leaving him and his six brothers in China; that his mother died in Manila eleven years ago. The appellant was eighteen years of age at the time of his arrival at the port of Seattle, and claimed to be a citizen of the Philippine Islands.

A fundamental rule of law is that a person is a citizen of the country in which he was born. In this country citizenship has been extended to children born abroad whose *fathers* were citizens of the United States at the time of the birth of said children (Sec. 1993 R. S.). There is nothing in the present record to indicate that the appellant's *father* was ever a citizen of the Philippine Islands or that the appellant is other than a legitimate son of his alleged father and mother. The appellant presented no passport

as a citizen of the Philippine Islands and the only evidence in support of his claim that he is such citizen is a notation appearing on the paper he presents, as follows:

"Landed as P. I. citizen, natural son of Antonia Sobre, a Filipino woman, C. B. R. 2950, case 7."

The above notation seems to indicate that the appellant was recognized as a citizen of the Philippine Islands by the Customs authorities of those islands, but does not indicate that such citizenship was ever recognized by any court. It is, therefore, not res adjudicata.

It appears that the sole basis of the admission to the Philippine Islands of the appellant and his six alleged brothers was the statement of a Filipino woman that all these boys were sons of her deceased sister. In this connection the appellant stated that he first saw this woman in China when he was a small boy and never saw her again until she testified in his behalf when he was applying for admission to the Philippine Islands; that he never saw her afterwards except when his younger brother went to the Philippine Islands. The appellant was never in the Philippine Islands until March 21, 1925.

In view of the foregoing it does not appear that the Immigration Officials of this country were under any

obligation to recognize the appellant as a citizen of the Philippine Islands and it is not understood under what principle of law he was so recognized by the Philippine Customs authorities. If they had no warrant of law for recognizing him as such citizen, as appears to be the case, the United States Government is certainly not bound by their action.

Unless the appellant's Philippine citizenship is conceded, the paper which he presented is of no value, as it was issued by the Collector of Customs of the Philippine Islands, who has authority to issue such documents to *citizens of the Philippine Islands only.* The Secretary of Labor maintained and we also contend that it has not been shown that appellant is a citizen of the Philippine Islands and that *he must be considered a citizen of China.* Therefore the paper which he presents was not issued by proper authority and is of no value and, being of the Chinese race, appellant is an alien ineligible to citizenship, not included in any class of such aliens specified as admissible by Section 13 (c) of the Immigration Act of 1924.

IV.

The paper presented by appellant shows: "Estimated value of business prior to application, P.5000.00. Estimated value of business at time of

application, P.5500.00." The appellant stated that the value of the business at the time his paper was issued was a little over $5,000 gold, and was about the same at the time he testified. As the appellant's statement on arrival gives the value of the business of his alleged firm as about twice that shown in the paper which he presented, his statement constitutes a material controversion of his paper.

The appellant states that his firm consists of himself and his six brothers and is engaged in the exporting and importing business in Manila. He also states that *his firm had no name.* How it could be reasonably possible for an importing and exporting concern to transact business without some sort of a firm name to do business and conduct correspondence under is extremely difficult to understand.

The appellant also states that he was not at the store when the representative of the Philippine Customs investigated the store, and knows nothing regarding what investigation he made, except that his brothers told him that such a person had been at the store. Appellant claims that at first he was manager and later bookkeeper for the firm but was not even able to state what rent was paid for the store.

V.

Counsel for the appellant, on pages eight and nine of his brief, gives citations in support of his contention that the statute defining a "merchant" *should receive a reasonable construction.* We agree that both the statute and the Treaty of 1880 should receive such construction.

The construction which Congress placed upon the term "merchant" is evidenced by the language of the Act of November 3, 1893, (28 Stat. L. 7), when it specified that, in order to be admissible on the ground that he was formerly engaged in this country as a merchant, a Chinese must establish by the testimony of two credible witnesses other than Chinese that he had conducted a mercantile business for at least one year prior to his departure from the United States. While the treaty of 1880 with China does not contain any definition of a merchant and does not specify any length of time a Chinese must be a merchant in China to be entitled to a Section 6 certificate, it would seem reasonable to hold that a Chinese who has never been in this country should not be accorded more leniency in the matter of time as a merchant than one who has already been a resident here for perhaps many years.

The appellant claims that he was born on a Chinese date equivalent to May 15, 1907, and was therefore less than eighteen years old when he claims to have established the business in question. He will not be twenty-one years old until May 15, 1928. Consequently he is an "infant" in law and has not the capacity to enter into any other than a voidable contract, nor to sue or be sued in a court of law without having a guardian ad litem appointed to represent him. He claims that the firm on which he predicates his mercantile status was established April 1, 1925, —ten days after his arrival at Manila—and, according to the paper he presented, his application for a merchant's certificate was made August 24, 1925,—*less than five months later.* This would seem to indicate plainly that the purpose of establishing this alleged importing and exporting concern was primarily to form a colorable basis for the appellant—and probably all six of his alleged brothers—to gain admission to the mainland of the United States. (The appellant is the fourth member of this alleged family to apply for admission. The other three were excluded and deported.)

Article II of the Treaty of 1880 applied to Chinese subjects *proceeding to* the United States as teachers, students, merchants, etc. (Italics ours.) It does not necessarily apply to all Chinese WHO MERELY SAY

that they are proceeding to this country as such. This treaty also, as far as merchants are concerned, was undoubtedly intended to promote commerce between China and the United States, and the Act of 1882-1884 and the subsequent laws regulating the admission of merchants and other admissible classes of Chinese were passed in pursuance of and to carry out the provisions of said treaty, and also to provide for the admission of admissible persons of the Chinese race who were citizens of countries other than China. It is believed that, in the absence of any specific definition of a merchant in China or any other foreign country, the treaty and the laws are entitled to a reasonable construction and that the term "MERCHANT" should be construed *in accordance with the evident intent* of such treaty and laws.

Does it seem reasonable to contend that this country entered into a treaty with China and passed laws to execute the terms of that treaty and to apply to Chinese citizens of other countries, for the purpose of allowing Chinese boys, 18 years old, without the capacity to enter into binding contracts, to enter this country under the guise of "merchants" because they may have been connected with some store in China or some other country for a few months? WE DO NOT THINK SO.

If this appellant is entitled to the status of a "merchant," it would seem that any school-boy of any age who has been connected with a store for any length of time—no matter how short a time—would be entitled to the same status. We cannot believe that the treaty was negotiated between this country and China for any such purpose or that, when the law was passed regarding the admissibility of Chinese merchants, Congress had any such class of persons in view. The reasonable view to take would be that Congress had in mind *bona fide merchants* who were physically, mentally, financially and legally competent to transact a mercantile business in this country.

That the Collector of Customs at Manila (or whoever handles this class of work in the Manila Custom House) has very little conception of the requirements of the laws regulating the admission of Chinese to the mainland of the United States seems to be amply evidenced by the records of the three alleged brothers of the present appellant, which are exhibits at this time. In all three of these cases so-called Section 6 certificates were issued, showing the occupation of the persons referred to in said certificates as EMPLOYEE, which gave them no standing whatever as indicating that they were admissible under said laws, and all three were deported. It is believed that the

present case constitutes another instance of misapprehension of the intent, at least, of such laws.

The statement of counsel for appellant as to the kind of papers held by the three alleged brothers is erroneous and his statement that appellant's exclusion was based on the action taken in the alleged brothers' cases does not appear to be supported by the record.

The case of *United States vs. Joe Dick*, 134 Fed. 988, cited by counsel, does not appear to have any particular bearing on the present case.

Counsel also cites the case of *United States vs. Moy Non*, 249 Fed. 772, decided by the District Court for the Northern District of Iowa, April 2, 1918, in an attempt to justify his contention that the District Court erred in denying the writ in this case. The case cited was an appeal from an order of deportation issued by a United States Commissioner. The opinion of the District Court shows that the then appellant came to the United States with his father about 1890, at the age of twelve or thirteen. He had obtained a return certificate as a merchant in 1911 and his father had returned to China sometime prior to 1912. The appellant had participated in the business of the Hip Lung Company for some time prior to 1912, with an interest of $1,000. The fact whether or not MOY

NON, the then appellant, obtained his interest in the Hip Lung Company before he was twenty-one years old does not appear in the decision and was of no importance whatever as bearing on the merits of the case. He had proven a mercantile status in 1911, when he was 32 or 33 years old. The number of years he had been a merchant before that was not an issue in the case and consequently the quotation from the opinion cited by counsel was pure dictum and, even if it were not such, it would, of course, have no controlling influence on the decision of this court.

We maintain that the appellant was accorded a fair hearing by the Immigration officials; that the District Court committed no error in denying the writ of habeas corpus; that its decision should be *affirmed.*

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,

C. T. McKINNEY,
Assistant United States Attorney,
Attorneys for Appellant.

No. 4840

United States

Circuit Court of Appeals

For the Ninth Circuit.

10

WONG FOOK JUNG,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4840

United States

Circuit Court of Appeals

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WONG FOOK JUNG,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

HUGH C. TODD, Esquire,
Attorney for Appellant, 323 Lyon Building, Seattle, Washington.

THOMAS P. REVELLE, Esquire,
Attorney for Appellee, 310 Federal Building, Seattle, Washington.

C. T. McKINNEY, Esquire,
Attorney for Appellee, 315 Federal Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 10,326.

In the Matter of the Application of WONG FOOK JUNG for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

Comes now Wong Tee Doy, and petitions this Court to issue a writ of habeas corpus to inquire into the cause of the detention of Wong Fook Jung by the Honorable Luther Weedin, Commissioner of Immigration, at Seattle, Washington, and shows to the Court as follows:

I.

That your petitioner, Wong Tee Doy, is a citizen of the United States of Chinese descent, born in

*Page-number appearing at the foot of page of original certified Transcript of Record.

San Francisco, California, aged 58 years; and that Wong Gar Yick, aged 62 years, was a brother of your petitioner, he being a citizen of the United States by virtue of being born in San Francisco, California; that the above-named Wong Fook Jung was born in the year 1885 at 311 Alder Street, Portland, Oregon, and is the son of my brother, the said Wong Gar Yick, now deceased; that the said Wong Fook Jung, my nephew, applied for admission to the United States as a citizen thereof; that he is now detained at the United States Immigration Station at Seattle, Washington, by the said Luther Weedin, Commissioner of Immigration, in the proceedings from his application to be admitted to the United States, as a citizen of the United States. [2]

II.

That the said Wong Fook Jung is imprisoned and restrained of his liberty by the said Commissioner of Immigration at said Immigration Station; that he has not been committed and is not detained by virtue of any judgment, decree, final order or process issued by a court or Judge of the United States, in a case where such courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by commencement of legal proceedings in such a court, nor is he detained by virtue of the final judgment or decree of a court of competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for con-

tempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order; or by virtue of a warrant issued from any court upon an indictment or information.

III.

That the cause or pretense of the imprisonment and restraint of the said Wong Fook Jung, according to the best knowledge and belief of your petitioner, is that the said Commissioner ruled that the said Wong Fook Jung was an alien person, not a member of any of the exempt classes of Chinese entitled to come into or remain in the United States, and accordingly refused him admission, from which finding an appeal was taken to the Secretary of Labor, which said appeal was thereafter dismissed by the Secretary of Labor. [3]

IV.

That the facts developed in the hearings in said applicant's case in regard to the sole issue therein, the United States citizenship of the said Wong Fook Jung, proved conclusively by competent evidence that he is a native-born citizen of the United States and that there is no evidence to the contrary; that the decision of the above-named immigration officials denying him admission to the United States is based upon suspicion and conjecture and not upon any evidence, and therefore said applicant has not been accorded a fair hearing.

V.

That the said Wong Fook Jung is being restrained of his liberty without due process of law,

in violation of the provisions of the Constitution of the United States and the laws governing such cases made and provided; that he is wrongfully, illegally and arbitrarily restrained of his liberty, and that said immigration officials are about to deport him, and that unless restrained by this Court will deport him forthwith.

WHEREFORE, your petitioner prays that a writ of habeas corpus may issue directed to Hon. Luther Weedin, Commissioner of Immigration at Seattle, Washington, commanding him to have the body of the said Wong Fook Jung before the undersigned Judge of the United States District Court, Western District of Washington, Northern Division, at the Federal Building at Seattle, Washington, and at such time as in said writ may be named, to do and receive what shall then and there be considered concerning the said Wong Fook Jung, together with the time and cause of his detention; and [4]

FURTHER that an order to show cause be issued by said Court ordering the said Hon. Luther Weedin, Commissioner of Immigration, at Seattle, Washington, to appear and show cause in said court on the 15th day of February, 1926, at two o'clock P. M., why said writ should not issue and to do and receive what shall then be considered concerning the said Wong Fook Jung, together with the time and place of his detention.

WONG TEE DOY,
Petitioner.

State of Washington,
County of King,—ss.

Wong Tee Doy, being first duly sworn, on oath deposes and says, that he is the brother of the father of the applicant herein, and is the nearest relative now residing in the United States; that he has read the foregoing petition, knows the contents thereof, and knows that the same is true.

WONG TEE DOY,
Petitioner.

Subscribed and sworn to before me this 27th day of January, 1926.

[Seal] ANNE C. MARTIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Jan. 29, 1926. [5]

No. 10,326.

In Re WONG FOOK JUNG.

State of Oregon,
County of Multnomah,—ss.

AFFIDAVIT OF MOY BACK HIN.

I, Moy Back Hin, being first duly sworn, depose and say:

That I am a resident and inhabitant of the City of Portland, Oregon, and have been for over fifty years last past;

That I am now and have been for many years last

past, Chinese Consul, residing in Portland, Multnomah County, Oregon;

That I was formerly acquainted with Wong Guy Yick, and that in about the year of 1887, Wong Guy Yick, with his wife and two children departed from Portland for China, the children were both boys and about the ages of two and three years. Wong Guy Yick has been a prominent business man here and prior to his leaving for China, took more or less interest in things pretaining to the chinese people, and is one of the reasons for my distinctly remembering his leaving Portland for China, and that I also remember that I had certain business matters to adjust with Wong Guy Yick just prior to his departure.

I am making this affidavit for the purpose of establishing the status of his son Wong Fook Jung, who is applying for admission to the United States and I believe that he is entitled to such admission as the son of Wong Guy Yick.

MOY BACK HIN.

Subscribed and sworn to before me this 9th day of February, 1926.

[Seal] L. H. TARPLEY,
Notary Public for Oregon.

My commission expires December 19, 1927.

[Endorsed]: Filed Feb. 15, 1926. [6]

No. 10,326.

State of Oregon,
County of Multnomah,—ss.

AFFIDAVIT OF WONG TEE DOY.

I, Wong Tee Doy, being first duly sworn, depose and say:

That I am a native of the United States having been born in San Francisco, California, in the year of 1867, and I have resided in the United States all my life except temporary visits to China.

That I went to China and returned to the United States in the year of 1918 and in my examination on my return, if I made the statement that my brother Wong Guy Yick did not have any family, it was a misinterpretation of my evidence and if I said anything of that kind, I meant that my brother at that time did not have any family in the United States because I have always testified and stated, which is a fact, that my brother Wong Guy Yick had a family consisting of a wife and two sons and I also made an affidavit to that effect on the 29th day of March, 1904, before L. H. Tarpley, at Portland, Oregon, that I had a brother in China, Wong Guy Yick, who had two sons, one of them having been born about the year 1884 and the other the year 1885, and that my three sons, my wife and my brother and his wife and two sons, went to China in the year 1888 and that Wong Fook Jung was one of the sons of Wong Guy Yick that went to China with his brother at that time.

WONG TEE DOY.

Subscribed and sworn to before me this 16 day of February, 1926.

[Seal] L. H. TARPLEY,
Notary Public for Oregon.

My commission expires Dec. 19, 1927.

[Endorsed]: Filed Feb. 15, 1926. [6½]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

On the petition of Wong Tee Doy, duly signed and verified, whereby it appears that the above-named applicant is wrongfully and illegally imprisoned and restrained of his liberty by Hon. Luther Weedin, Commissioner of Immigration at Seattle, Washington, and stating wherein the illegality exists, from which it appears that a writ of habeas corpus ought to issue;

NOW, THEREFORE, it is by this Court

ORDERED, ADJUDGED AND DECREED that the said Luther Weedin be required to appear before me in the courtroom of said court on the 15th day of February, 1926, at two o'clock P. M. of said day, to show cause, if any he have, why the writ of habeas corpus should not be issued as prayed for in the petition on file herein, together with the time and cause of the detention of said applicant; and it is hereby

FURTHER ORDERED that the said Commissioner of Immigration shall retain custody of said applicant until the further order of this Court,

and the petitioner herein be required to pay the maintenance of said applicant while so detained in the Immigration Station.

Dated this 29th day of January, 1926.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed Jan. 29, 1926. [7]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Luther Weedin, Commissioner of Immigration——

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by handing to and leaving a true and correct copy thereof with him ——————————————

personally, at Seattle, in said District, on the 29th day of Jan., A. D. 1926.

E. B. BENN,
U. S. Marshal.
By E. E. Gaskill,
Deputy.

[Endorsed]: Filed Jan. 29, 1926. [8]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington:

Comes now the respondent, Luther Weedin, United States Commissioner of Immigration at Seattle, Washington, and, for answer and return to the order to show cause entered herein, certifies that the said Wong Fook Jung is detained by respondent for exclusion and deportation from the United States as an alien person not entitled to admission to the United States under the laws of the United States; that said Wong Fook Jung was detained by this respondent at the time he arrived at the port of Seattle, Washington, September 26, 1925, as an alien Chinese person not entitled to admission under the laws of the United States, pending a decision on his application for admission as a native-born citizen of the United States; that, at a hearing before a Board of Special Inquiry at the Seattle Immigration Office, the said Wong Fook Jung was unable to furnish satisfactory proof that he was born in the United States, and his application for admission to the United States was denied for that reason; that the said Wong Fook Jung appealed from the decision of the Board of Special Inquiry to the Secretary of Labor; that, since the final decision of the Secretary of Labor, respondent has held, and now holds and detains, the said Wong

Fook Jung for deportation from the United States as an alien person not entitled to admission to the United States under the laws of the United States, and subject to deportation under the laws of the United States. [9]

The original record of the Department of Labor, both on the hearing before the Board of Special Inquiry at Seattle, Washington, and on the submission of the record on the appeal to the Secretary of Labor at Washington, D. C., in the matter of the application of Wong Fook Jung for admission to the United States, is hereto attached and made a part and parcel of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a writ of habeas corpus be DENIED.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at Seattle, Washington, and the respondent named in the foregoing return; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 10th day of February, 1926.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Endorsed]: Filed Feb. 13, 1926. [10]

[Title of Court and Cause.]

DECISION.

The Immigration authorities denied entrance into this country, to petitioner, a Chinese from China, and he seeks to avoid their decision by habeas corpus.

Now as then, he claims to be a citizen of this country, upon claim of birth herein during his parents' domicile here. Upon the evidence the Immigration authorities found his claim to nativity here not proven. And petitioner's only contention is that the decision is without support in the evidence. Without adverting to familiar rules, it suffices to say that the Immigration authorities' refusal to credit the testimony of petitioner and his two material or vital witness-relatives, was exercise of their judgment and of their exclusive function with which the courts in habeas corpus cannot interfere.

They found that the present statements on oath of the alleged relatives that petitioner was the son of Wong Gar and born in 1885, were opposed by their like statements in 1918, that Wong Gar died

without family. And petitioner's credibility is impeached by interest.

The Immigration officers saw and heard the witnesses, and even as any triers of facts in such circumstances, their refusal to credit the testimony is final. No Court can insist they shall believe where their reason refuses to believe. As matter of fact, were this Court free to determine the facts for itself, the very best it could say for petitioner is that he has not sustained the burden of proof of his right to enter this country. This hearing was upon the record before the Immigration authorities, and if new evidence could be received here, it cannot be in form of *ex parte* affidavits. [11]

Incidentally, these efforts to secure entry of endless chains of Chinese sons,—of sons of sons *ad infinitum* (petitioner has four born and yet in China) might receive a salutary check by perjury proceedings, to which said relatives at least seem to have laid themselves fairly open.

Petition denied.

Feb. 19, 1926.

BOURQUIN, J.

[Endorsed]: Filed Feb. 19, 1926. [12]

[Title of Court and Cause.]

ORDER DENYING WRIT.

BE IT REMEMBERED, that this matter came on duly and regularly for hearing heretofore on February 17, 1926, before the undersigned Judge

of the above-entitled court, and the petitioner being represented by Hugh C. Todd, Esquire, his attorney, and respondent Luther Weedin, as Commissioner of Immigration, being represented by Thos. P. Revelle, United States Attorney, and Arthur E. Simon, Assistant United States Attorney, and the Court being advised; now therefore, it is by the Court hereby

ORDERED that the rule to show cause heretofore entered herein be, and the same is hereby discharged, and that the application of Wong Fook Jung for a writ of habeas corpus be, and the same is hereby denied, and that the said Wong Fook Jung, petitioner herein, be, and he hereby is remanded to the custody of the Commissioner of Immigration.

Done in open court this 20th day of February, 1926.

BOURQUIN,
United States District Judge.

O. K. as to form.

HUGH C. TODD.

[Endorsed]: Filed Feb. 26, 1926. [13]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Luther Weedin, United States Commissioner of Immigration for the Port of Seattle, and to Thos. S. Revelle and Arthur E. Simon, His Attorneys:

YOU, AND EACH OF YOU, are hereby notified that Wong Fook Jung, appellant above named, hereby and now appeals from that certain order, judgment and decree made herein by the above-entitled court on the 20th day of February, 1926, adjudging, holding, finding and decreeing that the above-named petitioner be denied a writ of habeas corpus, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

HUGH C. TODD,
Attorney for Appellant.

Service accepted 2/26/26.

ARTHUR E. SIMON,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 1926. [14]

Title of Court and Cause.]

PETITION FOR APPEAL.

Wong Fook Jung, the appellant above named, deeming himself aggrieved by the order and judgment entered herein on the 20th day of February,

1926, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon which said order and judgment is made, fully authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States.

HUGH C. TODD,
Attorney for Applicant.

Service accepted 2/26/26.

ARTHUR E. SIMON,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 26, 1926. [15]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding and deciding that a writ of habeas corpus should be denied the appellant herein.

II.

The Court erred in holding and deciding that the appellant herein had not proved that he was a citizen of the United States, entitled to be admitted to the United States as a citizen thereof.

III.

The Court erred in holding and deciding that the appellant herein should not be discharged from the

custody of the Commissioner of Immigration at Seattle, Washington.

HUGH C. TODD,
Attorney for Appellant.

Service accepted 2/26/26.

ARTHUR E. SIMON,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 26, 1926. [16]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BAIL.

Now, to wit, on this 26th day of February, 1926, it is ordered that the appeal be allowed as prayed for; upon executing a recognizance or bond to the United States of America, to be approved by the Court in the sum of Five Hundred Dollars ($500.00), for the appearance of said appellant to answer the judgment of the Circuit Court of Appeals and the further orders of this Court, and to pay all costs and expenses of his maintenance in *mesne* time.

Done in open court this 26th day of February, 1926.

BOURQUIN,
United States District Judge.

Service accepted 2/20/1926.

ARTHUR E. SIMON,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 26, 1926. [17]

UNITED STATES FIDELITY AND GUARANTY COMPANY.

Baltimore, Maryland.

No. ——. $500.00.

[Title of Court and Cause.]

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Wong Fook Jung, as principal, and the United States Fidelity & Guaranty Company, a corporation, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Five Hundred and no/100 Dollars ($500.00), lawful money of the United States, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of March, A. D. 1926.

WHEREAS, on the 20th day of February, A. D. 1926, the United States District Judge entered an order herein allowing an appeal, provided the applicant filed a bond in the sum of Five Hundred

Dollars ($500.00) for his appearance to answer the judgment of the Circuit Court of Appeals, and the further orders of the District Court, and to pay all costs and expenses of his maintenance in the meantime.

NOW, THEREFORE, the condition of this obligation is such that if the above bounden principal, Wong Fook Jung, shall abide all orders of said District and Circuit Courts, and shall pay all costs and expenses of his maintenance, then this obligation shall be void; otherwise it shall remain in full force and effect.

(Signature in Chinese.)

his

WONG X FOOK JUNG,

mark

Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY.

[Seal] By C. H. CAMPBELL,

Attorney-in-fact.

Witness:

HUGH C. TODD.

O. K. as to form and amount.

ARTHUR E. SIMON.

Ass't U. S. Atty.

Approved.

BOURQUIN,

U. S. District Judge. [18]

[Title of Court and Cause.]

STIPULATION RE TRANSMISSION OF ORIGINAL IMMIGRATION RECORD AND FILES OF DEPARTMENT OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between Hugh C. Todd, Esquire, attorney for petitioner above named, and Thos. P. Revelle, Esquire, and C. T. McKinney, Esquire, attorneys for respondent, Luther Weedin, United States Commissioner of Immigration, that the original file and record of the Department of Labor covering the proceedings against the petitioner above named, which was filed with the respondent's return to the order to show cause in the above-entitled cause, may be by the Clerk of this court sent up to the Clerk of the Circuit Court of Appeals, as part of the appellate record, in order that the said original immigration file may be considered by the Circuit Court of Appeals, in lieu of a certified copy of said record and file, and that said original records may be transmitted as part of the appellate record.

HUGH C. TODD,
Attorney for Petitioner.
THOS. P. REVELLE,
United States Attorney.
C. T. McKINNEY,
Assistant United States Attorney.

[Endorsed]: Filed Apr. 6, 1926. [19]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD OF DEPARTMENT OF LABOR.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, Wong Fook Jung, which was filed with the respondent's return in the above-entitled cause, directly to the Clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done in open court this 6th day of April, 1926.

BOURQUIN,
United States District Judge.

Service accepted 4/6/26.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Apr. 6, 1926. [20]

[Title of Court and Cause.]

PRAECIPE OF APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the

transcript and following portions of the record in the above-entitled case for appeal of the said appellant, heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Return to order to show cause.
4. Decision of Honorable George M. Bourquin denying writ, filed February 19, 1926.
5. Order denying writ.
6. Petition for appeal.
7. Notice of appeal.
8. Order allowing appeal.
9. Assignment of errors.
10. Citation.
11. Stipulation.
12. Order for transmission of original record.
13. Affidavit of Moy Back Hin.
14. This praecipe.

HUGH C. TODD,
Attorney for Appellant.

[Endorsed]: Filed Apr. 6, 1926. [21]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington,

do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 21, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington *to the United States District Court of Washington* to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [22]

Clerk's fees (Act of February 11, 1925) for making record, certificate, or return, 52 folios at 15¢	$7.80
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to original exhibits, with seal	.50
Total	$8.80

I hereby certify that the above cost for preparing and certifying record, amounting to $8.80, has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation in this cause issued.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15th day of April, 1926.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [23]

[Title of Court and Cause.]

CITATION.

United States of America,—ss.

To the Honorable Luther Weedin, United States Commissioner of the Immigration at the Port of Seattle, Washington, GREETING:

WHEREAS, Wong Fook Jung has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment, order and decree lately, on to wit, the 20th day of February, 1926, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that the writ of habeas corpus as prayed for in the petition herein be denied.

You are therefore cited to appear before the United States Circuit Court of Appeals, in the City of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the City of Seattle, in the Ninth Circuit, this 6th day of April, in the year of our Lord nineteen hundred and twenty-six, and of the Independence of the United States the one hundred fiftieth.

[Seal] BOURQUIN,
United States District Judge.

Service accepted 4/6/26.

C. T. McKINNEY,
Asst. U. S. Atty. [24]

[Endorsed]: Filed Apr. 6, 1926. [25]

[Endorsed]: No. 4840. United States Circuit Court of Appeals for the Ninth Circuit. Wong Fook Jung, Appellant, vs. Luther Weedin, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 17, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4840

WONG FOOK JUNG, Appellant

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant

HUGH C. TODD
Attorney for Appellant
323-325 Lyon Building, Seattle, Washington

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4840

WONG FOOK JUNG, Appellant

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant

STATEMENT OF THE CASE

This is an appeal from an order denying the petition for a writ of habeas corpus. Appellant applied for admission to the United States, basing his right to admission on the ground that he is a citizen of the United States of Chinese descent, having been

born in Portland, Oregon. He was denied admission by the immigration officials for the reason that in their opinion he had not established his birth in this country. The appellant, in addition to himself, presented several witnesses who proved his citizenship. The Government produced no witnesses, and depends entirely on certain alleged contradictions to discredit appellant's case. The appellant, Wong Fook Jung, was born on December 11, 1886, at 311 Alder Street, Portland, Oregon. His father, Wong Gar Yick, was a merchant in Portland at that time. The record in this case proves these facts, and therefore appellant is entitled to be admitted to the United States as a citizen thereof.

ARGUMENT

The question for this court to decide is a matter of fact and not of law. In submitting this case appellant is not unmindful of the fact that under ordinary circumstances the courts have no jurisdiction to review the decision of the Secretary of Labor on a disputed state of facts, and that the courts in such a case have no authority to weigh the evidence for or against appellant. However, it is here contended that the evidence in this case proves American nativity without any question, and that there is no evidence

in the record to the contrary, and therefore the decision of the immigration officials "is based upon suspicion and conjecture and not upon any evidence," and therefore subject to review by the courts.

The courts will assume jurisdiction where "the finding was not supported by the evidence."

Ng Tung Ho vs. Hoyt, 187 U. S. 94; 47 L. Ed. 90.

259 U. S. 492;

239 U. S. 3.

"Orders for deportation of Chinese laborers made on the sole ground that they have failed to show that they were bona fide merchants within the Chinese Exclusion Act of May 5, 1892, at the time registration was required, will be reversed by the Federal Supreme Court where that court is satisfied from an examination of the record that the testimony did establish that fact."

Tom Hong vs. U. S., 193 U. S. 517.

The record in this case shows that Wong Gar Yick, the father of Wong Fook Jung, the appellant, was residing at 311 Alder Street, Portland, Oregon, on December 11, 1886, at which time and place the appellant was born; that Wong Tee Doy, a brother of appellant's father, resided at the same place in Portland at that time; that each of said brothers was married and lived with his family at said 311 Alder

Street, Portland, Orgeon; that Wong Gar Yick's family consisted of his wife and two small boys, one being the appellant; that Wong Gar Yick left the United States for China in the year 1888, taking with him his family and the wife and children of his brother, Wong Tee Doy; that Wong Gar Yick, the father of appellant returned to the United States in the year 1902, where he subsequently died.

The record further shows that Wong Tee Doy subsequently returned to China and when he came back to the United States he also was denied admission by the immigration authorities who, as in the instant case, did not believe that he furnished sufficient proof of his birth in the United States, but he was landed by Judge Bellinger of the District Court at Portland, Oregon, upon his application for a writ of habeas corpus. The record further shows that when Wong Tee Doy's son, Wong Wah, applied for admission at the Port of Seattle on the ground that he was born in Portland, he too was denied admission by the immigration authorities for the reason that they did not believe, as in the instant case, that the applicant had proved his American nativity. Accordingly, he applied for a writ of habeas corpus, which was granted by Judge Hanford on May 14, 1900, and Wong Wah was landed as an American citizen. Bear in mind that Wong Tee Doy, denied

admission by the immigration authorities, and landed by the District Court in Portland, is a brother of appellant's father, and that Wong Wah, denied admission by the immigration authorities, and subsequently landed by the District Court in Seattle, is a cousin of the appellant, all of whom resided at the same store in Portland, Oregon, in the early eighties.

Now, the appellant, Wong Fook Jung, applies for admission at the Port of Seattle, and as was the case with his uncle and cousin, he is rejected by the immigration officials, which makes it apparent that the immigration service does not believe that any of this family are citizens and consistently rejects each one as he applies for admission. It is here maintained that the appellant is just as much entitled to be admitted to the United States upon his proof as Wong Tee Doy, his uncle, was entitled to be admitted by Judge Bellinger, and as Wong Wah, his cousin, was entitled to be admitted by Judge Hanford.

The following witnesses testified as to the American citizenship of the appellant: Wong Tee Doy, uncle; Hom Ngook, aunt; Wong Wah, cousin; Jong You, Chinese acquaintance, and William P. Swope, resident of Portland. The Government presented no witnesses.

Wong Tee Doy: This witness testified that the appellant was born on December 11, 1886, at 311

Alder Street, Portland, appellant's father being Wong Gar Yick, a brother of this witness; that in 1888 his brother, the father of appellant, went to China in company with his family, including appellant and witness's wife and children. The witness stated he later visited China and returned and also brought back his own boys, all of whom were landed by the Federal Courts.

Wong Wah: This witness is a cousin of the appellant and went to China with him when they were both small children. The witness at that time being only four years old, does not recall the journey, but he testified to the fact that appellant is the son of Wong Gar Yick, and from general knowledge in their village in China testified as much as he was competent to do to the fact that the appellant was born in the United States.

Hom Ngook: This witness is an aunt of the appellant, and is the second wife of Wong Tee Doy, his first wife who left Portland with appellant being deceased. This witness identified the appellant as the son of Wong Gar Yick, and like Wong Wah, testifies as far as she knows that it was the general understanding in their village in China that appellant was born in the United States.

Jong You: This witness is a Chinese friend of this family, and testifies that he knew Wong Gar Yick in Portland, and that he had a family there in the early days, and also identifies the appellant as the son of Wong Gar Yick, and to his best knowledge and belief states that appellant was born in the United States.

William P. Swope: This white witness was acquainted with the appellant's father, Wong Gar Yick, and appellant's uncle, Wong Tee Doy, at 311 Alder Street, Portland, in the early eighties, and testifies that the said Wong Gar Yick, the father of the appellant, had two small boys residing with him at his home on Alder Street in Portland; that they later went to China, but of course, he is not able to identify the appellant who is now forty years of age as one of those boys, but he testifies that Wong Gar Yick did have two small boys, born in Portland, Oregon, in the early eighties. Other witnesses have identified the appellant as one of those boys, as is hereinabove set forth.

The testimony of the appellant himself corroborates in so far as it is possible all of the testimony in his behalf submitted by the witnesses hereinabove mentioned.

It is submitted that all of this proof and testimony is to the effect that the appellant, Wong Fook Jung, was born in Portland, Oregon, about the year 1886. It must be recognized that in those days birth certificates were not a matter of record, and that it is with some difficulty that proof is offered of birth of a Chinaman in this country forty years ago, as in the instant case. More proof of the fact of appellant's birth in this country is here furnished than is usually possible in Chinese cases where birth has taken place approximately forty years ago.

As above stated, the Government introduced no witnesses against the appellant, but has depended upon certain alleged discrepancies which the immigration service felt sufficient to cause rejection in this case, just as it felt that the discrepancies in the case of Wong Tee Doy and of Wong Wah were sufficient to cause their rejection, although both of the latter were subsequently admitted to this country by the District Courts.

We now come to the deciding point in this case, and the decision must be based upon a construction of the word "leave," to be found in the testimony of Wong Tee Doy, the uncle of appellant, in 1918, when testifying on behalf of his son, Wong Nung, who was then an applicant for admission to the

United States. On that examination the Chinese inspector asked Wong Tee Doy if he had a brother, and he answered, "Yes, I had a brother (meaning Wong Gar Yick), but he has been dead a good many years." Then the Chinese inspector, instead of asking him the usual question whether or not this brother *had* a family, or ever *had* any children, this being the usual form of question, asked the witness Wong Tee Doy the following very ambiguous and isolated question:

"Q. Did he *leave* any family?
"A. No."

The immigration service in applying that question to the instant case immediately jumped to the conclusion that Wong Tee Doy in 1918 testified that his brother never had any family, and concluded from the witness's answer, that his brother did not "*leave*" any family, that he meant that he never *had* any family. Wong Nung, the applicant for admission at that time, gave the same answer to the same question. But from an examination of the entire record, and unless all of the witnesses submitted on behalf of the appellant are perjuring themselves, we must conclude that when this witness said that his brother did not "*leave*" any family he meant something else besides that which the immigration inspectors interpret that he meant. In other words, he could not

have meant that his brother did not *have* any family, because all of the testimony is to the contrary. Therefore, he must have had something else in his mind, and ex parte affidavits were introduced at the hearing on the application for a writ of habeas corpus to show what was in the witness's mind when that question was propounded to him; but the court held that such ex parte affidavits could not be considered as the record was already made up. However, these affidavits are in the record for what they are worth, as they do throw some light on what was in the witness's mind when the immigration officials asked him that ambiguous question. In the light of all the testimony that Wong Gar Yick had a family in Portland, including two boys born there, we must conclude that the witness, when he said "no" to that question meant that his brother did not *"leave" any family in the United States when he left for China in* 1888. The court recognizes the fact that whenever a Chinese is asked a question about another Chinese who has been in this country it is usually in regard to his being or staying in the United States, and when the immigration inspector asked Wong Tee Doy did his brother *"leave"* any family and he immediately answered "No," this court must conclude he meant, in the light of all the testimony to the effect that he had a family, that his brother did not

"leave" any family in the United States, but took them all with him to China. It is submitted that taken by itself the question, "Did he *leave* any family," is unfair and ambiguous, and if the immigration officials expect to reject an applicant for admission, whose proof of birth is complete, on the witness's answer to an isolated, ambiguous question, then this court should pass upon all the evidence in the case, which is conclusive of the American nativity of the appellant. The Chinese inspector's question should have been, not did he *"leave"* any family, but did he *have* a wife and children; and if that question had been propounded to him, no doubt in the light of all of the testimony here to the effect that he did have a family, including two boys born in Portland, one of whom is the appellant, he would have answered "Yes," instead of "No."

It is respectfully submitted to this court that the immigration service was apparently of the opinion that Wong Tee Doy, the uncle, and Wong Wah, the cousin of this appellant, were not admissible to the United States and accordingly they had to resort to the courts which approved of their proof of American nativity and admitted them on writs of habeas corpus. So, in the instant case the immigration service clings tenatiously to its belief that others of this family were not born in the United States and

accordingly rejected the appellant, Wong Fook Jung, who is now appealing to this court to uphold the unquestioned line of testimony in his behalf to the effect that he was born in Portland, Oregon. He is entitled to be admitted to the United States, the same as others of his family have been admitted by the Courts.

Respectfully submitted,

HUGH C. TODD,
Attorney for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4840

WONG FOOK JUNG, Appellant

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, JUDGE

Brief of Appellee

THOS. P. REVELLE
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Federal Building, Seattle, Washington

In the

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, JUDGE

Brief of Appellee

STATEMENT OF THE CASE

The appellant, WONG FOOK JUNG, arrived at the port of Seattle, Washington, on the steamer "President Jefferson" September 26, 1925, and applied for admission into the United States as a na-

tive-born citizen of this country. He claimed to be thirty-nine years old and to have been born in Portland, Oregon, on a Chinese date equivalent to December 11, 1886. He also claimed to have a wife and four sons in China.

The appellant was accorded a hearing before a Board of Special Inquiry at Seattle, Washington, October 13, 1925. Thereafter statements were taken at Portland, Oregon, from an alleged paternal uncle, Wong Tee Doy, Wong Tee Doy's alleged wife, Hom Ngook, an alleged first cousin named Wong Wah, another Chinese named Jong You, and a white man named William P. Swope. After receipt of this testimony from Portland, Oregon, the appellant was given another hearing before the Board of Special Inquiry at Seattle, Washington, at which time he was granted ten days in which to introduce such further evidence as he might desire in support of his claim of birth in this country. The ten days privilege was subsequently waived by appellant's counsel and thereafter, on November 19th, 1925, the appellant was excluded by a unanimous vote of the Board of Special Inquiry for the reason that the evidence did not prove that he was the son of his alleged father, WONG NGAH YICK, or that he was born in this country; also for the further reason that he was *an alien ineligible to citizenship* and inadmissible under

the Immigration Act of 1924. Thereafter appellant appealed from this decision to the Secretary of Labor at Washington, D. C. His appeal was dismissed and appellant ordered deported to China. Thereafter, he filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington, Northern Division. The case now comes before this court on appeal from the decision of the District Court denying said petition.

ARGUMENT

There Is No Question of Law in This Case

The attorney concedes that the only question at issue is one of fact, but contends that the evidence proves the American nativity of the appellant without question and that the excluding decision of the Immigration officials "is based upon suspicion and conjecture, and not upon any evidence," and is therefore subject to review by the courts. He also practically charges that the appellant was excluded by the immigration officials on account of a prejudice they have against WONG TEE DOY, and his alleged relatives, because WONG TEE DOY, appellant's alleged uncle, and WONG WAH, an alleged son of Wong Tee Doy, were denied admission years ago, and afterwards granted writs of habeas corpus

by District Courts. No evidence to warrant any such charge against the immigration officials appears in the record.

The evidence which was before the Board of Special Inquiry and the Department of Labor at Washington consists of the statements of the appellant and witnesses named above and the contents of Seattle files 4010/11-12, 35680/1-3, 35680/3-9, 3460/14-9, 2133/2-6, 30/311, 27710, and 4010/12-4, relating to Wong Tee Doy, Hom Ngook, alias Mrs. Wong Tee Doy, Wong Nung, Wong Wah, Jon Yo, Wong Wing, Wong Foo and Wong Sun, respectively.

The claim was set up that the appellant is a son of WONG NGAH YICK (or WONG GAR YICK), a brother of WONG TEE DOY, and was born at No. 311 Alder Street, Portland, Oregon, December 11, 1886; that the families of Wong Tee Doy and Wong Ngah Yick lived at that address, upstairs over the FOOK LEE store; that Wong Tee Doy had a wife and three sons and Wong Ngah Yick a wife and two sons, the appellant and WONG SEUNG, a year older than appellant; that Wong Ngah Yick took his own family and Wong Tee Doy's family to China in 1888; that WONG NGAH YICK subsequently returned to the United States and died somewhere in this country between ten and eighteen years ago.

The statements of witness WILLIAM P. SWOPE fall far short of being convincing. He claims to have a vague recollection of some Chinaman named Wong, who he thinks was a brother of Wong Tee Doy, living somewhere on Alder Street, between 5th and 6th Streets, Portland, and that said Chinaman had two boys, one two or three years old and the other smaller. He has no recollection of ever having seen any other children there. In this connection it will be noted that Wong Tee Doy claims to have lived at the same address and to have had three sons, *which would have made a total of five children living there.* The whole statement of this witness would seem to indicate that it is probably the result of suggestion on the part of Wong Tee Doy.

Witness JONG YOU claims to remember having seen WONG NGAH YICK only once and states that said occasion was about 22 years ago. He states that he first saw the appellant about 16 years ago, in China. Consequently he has no personal knowledge regarding appellant's birthplace. *He also could not identify appellant's photograph, although he claims that he saw him less than three years ago.*

Witness HOM NGOOK, alias Mrs. Wong Tee Doy, never saw Wong Ngah Yick and states that she never saw the appellant until about nine years ago. She

claims that Wong Tee Doy and appellant told her that Wong Ngah Yick was appellant's father, and that appellant's mother told her that appellant was born in the United States. That is about all her testimony amounts to.

Witness WONG TEE DOY claims that, after taking his own family and Wong Tee Doy's family to China in 1888, his brother, WONG NGAH YICK, *remained in China until 1902*, when he returned to this country. This statement is corroborated by Wong Tee Doy's alleged son, WONG WAH. THE APPELLANT states that *his father returned to the United States when he* (*appellant*) *was three or four years old, and that he has never seen him since*, whereas he must have been *at least fifteen years of age in 1902.*

Witness WONG TEE DOY stated March 19, 1900, that his wife and three children accompanied his brother, Wong Gai Yick, to China in December, *1889*, and made no mention of his brother's family accompanying him, or of his brother having any family. He also stated that there were other Chinese families living at Sixth and Alder Street, Portland, at that time, *but did not remember who they were. If his own brother's wife and two sons had lived there, why did he make this statement?* (See Seattle 3460/14-9.)

Witness WONG TEE DOY testified as follows in 1918 (Seattle 35680/1-3):

"Q. Have you any brothers or sisters?
"A. No.
"Q. Did you ever have a brother?
"A. Yes; I had a brother but he has been dead a good many years.
"Q. Did he leave any family?
"A. No."

WONG NUNG, an alleged son of this witness and an applicant for admission at that time, also testified as follows:

"Q. Did your father ever have any brothers or sisters?
"A. One brother; no sisters.
"Q. Where is that brother? What is his name?
"A. I don't know his name; he is dead; I never saw him.
"Q. Did your father's brother leave any family?
"A. No."

The attorney designates the foregoing testimony as the deciding point in the case and concludes that, when WONG TEE DOY stated that his brother did not leave any family, he did not mean that he did not leave any family WHEN HE DIED, *but meant that he did not leave any family in the United States when he went to China in 1888.* Considering the questions and answers immediately preceding, it must have required the exercise of considerable imagina-

tion and ingenuity to have been able to arrive at this conclusion. Such reasoning is too far-fetched for the writer.

If it were reasonably possible that Wong Tee Doy's statement could be construed to have the meaning assigned to it by the attorney, WHAT DID WONG NUNG MEAN when he stated that his father's brother was dead; that he never saw him; *that he did not know his name, and that he did not leave any family?* WONG NUNG was only fourteen years old and had never been to the United States. Did his mind naturally hark back also to the alleged departure of his alleged uncle from the United States for China thirty years previously, long before he was born? WE DO NOT THINK SO. If the appellant and a brother, Wong Seung, had been living in the same village in China with this boy all his life, and were sons of his father's brother, as is claimed, is it conceivable that, when he was questioned as above set forth, this boy would not have mentioned them and have known the name of their father? The only reasonable construction to be placed on his statements is that THERE WERE NO SUCH PERSONS THERE.

So far as we know the Immigration Service is in possession of no record whatever relating to WONG

NGAH YICK, appellant's alleged father, and consequently *we have no statement by him* as to whether or not he was ever married or ever had any children. *There is also no official record that he ever was in this country.* The appellant claims that he died somewhat over ten years ago and WONG TEE DOY states that he died seventeen or eighteen years ago. Neither has any definite knowledge as to when or where he died. According to their statements his bones have never been sent to China, in accordance with the usual Chinese custom. NOT AN IOTA OF EVIDENCE HAS BEEN PRODUCED THAT HE IS DEAD except the statements of these people that they have not heard from him for the number of years stated. If this man died in the United States, as is claimed, 10 years ago, or 17 or 18 years ago, it is a natural supposition that, wherever he died, he would have had some friends or acquaintances who would have notified his family in China of his death and, IF HE IS DEAD, the fact that the appellant has never received any notification regarding the particulars of his death is, in itself, strong evidence that the appellant is not his son. IF HE IS NOT DEAD, the BEST EVIDENCE of appellant's claim has not been produced.

The character of the alleged uncle, WONG TEE DOY, and his regard for the laws of this country,

of which he claims to be a citizen, are evidenced by the fact that, although he has a wife in this country, he admits that he married another woman on his last trip to China last year.

The following quotation from District Judge Bourquin's decision denying the writ of habeas corpus shows his opinion of this case:

* * *

"Without adverting to familiar rules, it suffices to say that the Immigration authorities' refusal to credit the testimony of petitioner and his two material or vital witness-relatives was exercise of their judgment and of their exclusive function, with which the courts in habeas corpus cannot interfere.

"They found that the present statements on oath of the alleged relatives that the petitioner was the son of Wong Gar and born in 1886 were opposed by their like statements in 1918 that Wong Gar died without family, and petitioner's credibility is impeached by interest.

"The immigration officers saw and heard the witnesses and, even as any triers of facts in such circumstances, their refusal to credit the testimony is final. No court can insist they shall believe where their reason refuses to believe. As matter of fact were this court free to determine the facts for itself, the very best it could say for the petitioner is that he has not sustained the burden of proof of his right to enter this country.

* * *

"Incidentally these efforts to secure entry of endless chains of Chinese sons—of sons of sons ad in-

finitum (petitioner has four born and yet in China) might receive a salutary check by perjury proceedings, to which said relatives at least seem to have laid themselves fairly open."

It is maintained that the District Court did not err in denying the writ of habeas corpus in this case and that its decision should be AFFIRMED.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,

C. T. McKINNEY,
Assistant United States Attorney,
Attorneys for Apellant.

No. 4841

United States
Circuit Court of Appeals
For the Ninth Circuit.

PETER CHORAK,

Plaintff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4841

United States
Circuit Court of Appeals
For the Ninth Circuit.

PETER CHORAK,

Plaintff in Error,

vs.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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C. T. McKINNEY, Esquire,
Attorney for Defendant in Error, 303 Federal Building, Seattle, Washington. [1*]

(Comm'r. # —— Bail $—— Wash. 2823.)

United States District Court, Western District of Washington, Northern Division.

May, 1925, Term.

No. 9697.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PETE CHORAK,
Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Act of Oct. 28, 1919, National Prohibition Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That PETE CHORAK, on the tenth day of May, in the year of our Lord one thousand nine hundred and twenty-five, about one and one-half miles west of the city of Enumclaw, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, and unlawfully sell certain intoxicating liquor, to wit, twelve (12) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said PETE CHORAK as aforesaid, was then and there unlawful and

prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That prior to the commission by the said PETE CHORAK of the said offense of selling intoxicating liquor herein set forth and described in manner and form as aforesaid, said PETE CHORAK, on the 14th day of November, 1923, in cause No. 7971, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of selling intoxicating liquor on the 29th day of June, 1923, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That PETE CHORAK, on the tenth day of May, in the year of our Lord one thousand nine hundred and twenty-five, about one and one-half miles west of the city of Enumclaw, in the Northern Division of the Western District of Washington,

and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, one (1) ounce of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, intended then and there by the said PETE CHORAK for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said PETE CHORAK as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney. [5]

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court June 19, 1925. Ed. M. Lakin, Clerk. By P. A. Page, Deputy. [6]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA.

Now on this 3d day of August, 1925, the above defendant is called for arraignment, accompanied by his attorney F. C. Reagan, and says that his true name is Pete Chorak. Whereupon the reading is waived and he enters his plea of not guilty. Journal # 13, page 466. [7]

[Title of Court and Cause.]

TRIAL.

Now on this 16th day of September, 1925, this cause comes on for trial with both sides present. A jury is impanelled and sworn as follows: Howard N. Seeley, Mark Odell, Edgar A. Quigle, Alfred W. Love, Jacob H. Arensberg, Orin Babcock, Adolph Peterson, Charles E. Linder, Charles K. Miller, G. W. Turner, F. E. Walkley and George H. Sharon. Government makes opening statement. On motion of defendant witnesses are sworn and admonished and excluded from the courtroom except while testifying, save Agent Lambert as follows: Howard E. Carr, Otto Moses, R. A. Lambert and W. M. Whitney. Government witnesses are examined as follows: Otto Moses, I. H. Horton, and Howard E. Carr. Government exhibits numbered 1, 2, 3 and 4 are introduced as evidence. Journal No. 13, page 513. [8]

[Title of Court and Cause.]

TRIAL RESUMED.

Now on this 17th day of September, 1925, trial in the above-entitled cause is resumed with all parties present. The following Government witnesses are examined under oath; Richard A. Lambert and S. E. Leitch are sworn by the Court. Government Exhibits Numbered 1, 2, 3 and 4 are introduced and admitted in evidence. Government rests. Jury is excused while motion for a directed verdict is argued and denied with exceptions allowed. Defendant's witnesses are examined as follows: Pete Chorak. Defendant's Exhibit "A" is introduced and admitted as evidence. Both sides rest. Said cause is argued to the jury and recess is allowed until 2 P. M. Trial is resumed and the jury, after being instructed by the Court, retires for deliberation. Thereafter returning into court at 3:42 P. M. with a verdict. Verdict is acknowledged and reads as follows: "We, the jury in the above-entitled cause, find the defendant Pete Chorak is guilty as charged in Count I of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count II of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count III of the indictment herein, Mark Odell, Foreman. Jury is excused from the cause and sentence is continued until Monday, September 21,

1925. Defendant is allowed to go on present bond. Journal No. 13, page 514. [9]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant Pete Chorak is guilty as charged in Count I of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count II of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count III of the indictment herein.

MARK ODELL,
Foreman.

[Endorsed]: Filed Sep. 17, 1925. [10]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, Pete Chorak, and moves the Court for an order granting him a new trial herein, on the following grounds, to wit:

1. That the verdict is contrary to law.
2. That there was not sufficient evidence to support the verdict.
3. Errors in law occurring at the trial and duly excepted to by the said defendant.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

Acceptance of service of within motion acknowledged this 21 Sept., 1925.

J. W. HOAR,
Attorney for Ptff.

[Endorsed]: Filed Sep. 21, 1925. [11]

[Title of Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL.

Now on this 28th day of September, 1925, the above cause comes on for hearing on motion for new trial which is argued and taken under advisement until 2 P. M., at which time the Court rules from the bench denying motion. Exception is noted to defendant and sentence is passed at this time.

Journal No. 13, page 529. [12]

United States of America, Western District of Washington, Northern Division.

No. 9697.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PETE CHORAK,
Defendant.

JUDGMENT AND SENTENCE.

Comes now on this 28th day of September, 1925, the said defendant Pete Chorak into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the term of fifteen months at hard labor and to pay a fine of $200 *dollars* on Counts I and II taken together and a fine of $200 *dollars* on Count III. And the said defendant is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree No. 4, page 426. [13]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Above-entitled Court, and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant, Pete Chorak, by his attorney, John F. Dore, and respectfully shows that on the 16th day of September, 1925, a jury impanelled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty of the indictment theretofore filed in the above-entitled court and cause; and thereafter, within the time limited by law, under the rules and order of this Court, the defendant moved for a new trial, which said motion was by the Court overruled and an exception allowed; and thereafter, on the 28th day of September, 1925, said defendant was by order and judgment and sentence of the above-entitled court in said cause sentenced as follows: On Counts I and II of said indictment, to serve fifteen months in the United States Penitentiary at McNiel Island and to pay a fine of Two Hundred Dollars, and on Count III to pay a fine of Two Hundred Dollars.

And, your petitioner herein feeling himself aggrieved by said verdict and the judgment and sentence of the Court herein as aforesaid, and by the orders and rulings of said Court, and proceedings [14] in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the

Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said Court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided; and therefore, premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination said defendant be admitted to bail.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 29, 1925.

Acceptance of service of within petition acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney for Ptff. [15]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the above-named defendant, Pete Chorak, and in connection with his petition for writ of error in this cause, submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in admitting over the objection of the defendant the following testimony on redirect examination of the witness Moses, to wit:

> "I saw Chorak the day before the sale of the whiskey was made, and the occasion of seeing him the day before was that I was buying whiskey from him."

II.

The Court erred in admitting over the objection of the defendant testimony of the witness Moses to the effect that he told the Prohibition Agents where he got the liquor on which he became drunk the day preceding the date of the sale alleged in the indictment. [16]

III.

The Court erred in admitting in evidence over

the objection of the defendant the minutes of the Court relating to former conviction.

IV.

The Court erred in allowing the reading of the indictment on which there was a prior conviction, over the objection of the defendant.

V.

The Court erred in refusing to prevent, or, if impossible to prevent, to grant the defendant's motion to instruct the jury to disregard the argument of the United States Attorney, wherein he told the jury that the Indian had testified he purchased whiskey from Chorak on the day before that alleged in the indictment, and, when the Court said that such testimony had been stricken, the district attorney persisted in stating that he demanded the right to tell the jury what the witnesses testified and then repeating the statement that the Indian got drunk on whiskey he bought from Chorak, in refusing to discountenance such argument.

VI.

The Court erred in overruling the motion for a directed verdict on Count II.

VII.

The Court erred in overruling the motion for a directed verdict on Count III.

VIII.

The Court erred in overruling the motion for a new trial.

IX.

The Court erred in giving his instructions as a

whole, for the reason that the same were argumentative and an unfair comment [17] on the evidence, to wit, that part of said instructions reading as follows:

> "If, on the other hand, you believe that the quantity that was in these bottles was simply the part that remained after the others had been disposed of—while there is no evidence here that anything of that kind occurred, yet if all the circumstances lead you to believe that the defendant was engaged in dispensing liquor there, and that these bottles had simply been used there from which the content had already been disposed of, with the exception of what was in there, and this was left over in the ordinary routine of business there, when you would have a right to conclude that the contents of these bottles were not merely dregs remaining in the bottles which had been picked up, but was simply the content that remained after the other had been taken out."

X.

The Court erred in instructing the jury as follows, to wit:

> "What was the reasonable conduct of all the parties? How did this Indian happen to go over to the place where they say the liquor was bought? What was the motive that inspired him to go there? * * * There is evidence here that the Indian was in jail at Sumner, being placed there for intoxication,

and he told the witnesses upon the part of the Government where he got the liquor that made him intoxicated. Now then, what did the parties do? Then Mr. Lambert and the other parties offered by the Government took the Indian and went up to the place of business of the defendant; they gave the Indian $5 when they left Sumner and asked him to go in. The Indian took this money—they marked it. They say they examined him; the Indian says they did not examine him; one of the other witnesses said they did not examine him. Lambert rode with him in the car from Sumner to the place of business of the defendant. He went in there and the officers saw him go in and saw him come out. He came out with a bottle of liquor and returned $3, $2 is what he testified he paid for the liquor. The defendant says he did not get any—that he bought some cigarettes for fifteen cents and gave him a $5 bill and he gave him $4.85 back in change; the Indian says he did buy cigarettes and paid him fifteen cents. The Indian, I believe it is conceded, testified, and I don't know that it is denied, had $1.40."

XI.

The Court thereafter entered judgment and sentence against said defendant upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the Court so entered judgment and sentence upon the verdict.

And as to each and every of said assignments of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly excepted [18] and was allowed an exception wherever the same appears in the record to the ruling and order of the Court.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 29, 1925.

Acceptance of service of within assignments acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney. [19]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND.

A writ of error is granted on this 29 day of September, 1925, and it is further ordered that, pending the review herein, said defendant, Pete Chorak, be admitted to bail, and the amount of the supersedeas bond to be filed by said defendant be the sum of Three Thousand Dollars.

And it is further ordered that, upon the said defendant's filing his bond in the aforesaid sum, to be approved as by law provided, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 29 day of September, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 29, 1925.

Acceptance of service of within order acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney for Ptff. [20]

[Title of Court and Cause.]

APPEAL AND BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Pate Chorak, as principal, and Peter Verhonik and Fannie Verhonik of Enumclaw, King County, Washington, and Antone Gove and Francis Gove, of Enumclaw, King County, Washington, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Three Thousand Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that, whereas the said defendant was, on the 28th day of September, 1925, sentenced in the above-entitled cause to be confined for the period of fifteen months

at United States Penitentiary and to pay a *fine Four* Hundred Dollars; and, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Three Thousand Dollars.

Now, therefore, if the said defendant, Pete Chorak, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises and shall render himself amenable to and obey all process [21] issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this

obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated, this 28th day of September, 1925.

PETE CHORAK. (Seal)
PETER VERHONIK. (Seal)
her
FANNIE X VERONIK. (Seal)
mark
~~MIKE BODGON~~. (Seal)
~~LENA BOGDON~~. (Seal)
ANTON GOVE. (Seal)
FRANCIS GOVE. (Seal)

Witness: F. C. REAGAN.

O. K.————————,
Assistant United States Attorney.

Approved.

————————,
Judge.

Approved as to surety Sept. 29th, 1925.
[Seal] H. S. ELLIOTT,
U. S. Commissioner. [22]

United States of America,
State of Washington,
County of King,—ss.

Peter Verhonik and Fannie Verhonik, his wife, and Mike Bodgon and Lena Bogdon, his wife, being first duly sworn, on oath, each for himself and not one for the other, says:

I am a resident of the State of Washington, over the age of twenty-one years, and not an attorney

or counsellor at law, sheriff, clerk of the Superior Court, or other officer of such court, or of any other court; that I am worth, over and above all debts and liabilities, and exclusive of property exempt from execution, in real estate situate in King County, Washington, as follows: The said Peter and Fannie Verhonik N. W.^{4} of S. W.^{4}; S. E.^{4} S. W.^{4}; and N. W.^{4} S. E.^{4} Sec. 1, Twn. 20 N. R. 6 E., W. M. assessed valuation $3,850—No encumbrances actual value $7,000—This information gained from independent sources.

The said Antone Gove and Francis Grove, Lots 1 and 2, Sec. 1, Twn. 20 N. R. 6 E., W. M., assessed valuation $1,390— No encumbrances actual value $7,000—This information gained from independent sources.

PETER VERHONIK.
FANNIE X VERHONIK.
~~MIKE BOGDON.~~
~~LENA B. BOGDON.~~
ANTONE GOVE.
FRANCIS GOVE.

Witness: F. C. REAGAN.

The erasure of the names of Mike Bogdon and wife above was necessitated by the failure of said parties to present sufficient property to justify on the bond.

H. S. ELLIOTT,
U. S. Commissioner.

Subscribed and sworn to before me, this 28*st* day of September, 1925.

[Seal] H. S. ELLIOTT,
United States Commissioner.

[Endorsed]: Filed Sep. 29, 1925. [23]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 2, 1925, FOR FILING BILL OF EXCEPTIONS.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the bill of exceptions in the above-entitled cause be and the same hereby is extended to and including the 2d day of November, 1925.

Done in open court this 30 day of Oct. 1925.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Attorney.

Endorsed: Filed Oct. 29, 1925. [24]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 30, 1925, FOR FILING RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record in the

above-entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 30 day of Nov., 1925.

Done in open court, this 30 day of Oct., 1925.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Oct. 29, 1925. [25]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 12, 1925, TO FILE RECORD AND DOCKET CAUSE.

It appearing to the Court that the transcript of the record in the above-entitled cause is due in the Circuit Court of Appeals at San Francisco, California, on November 30, 1925, and it further appearing that the bill of exceptions in the above-entitled cause has not been settled or allowed,

NOW, THEREFORE, IT IS ORDERED that the time for filing the record in this cause be, and it hereby is, extended to and including the 12th day of December, 1925.

Done in open court this 23d day of November, 1925.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Nov. 23, 1925. [26]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 16th day of September, 1925, at the hour of 10:00 o'clock A. M., the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable Jeremiah Neterer, Judge thereof, the plaintiff appearing in person and by John F. Dore, his counsel, and the defendant appearing by Thomas P. Revelle and J. W. Hoar, United States Attorney, and Assistant United States Attorney.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

TESTIMONY OF OTTO MOSES, FOR THE GOVERNMENT.

OTTO MOSES, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I live at Snoqualmie, Washington. I am acquainted with Pete Chorak, who runs a gas station on the highway between Auburn and Enumclaw, and was in his place of business on May 10th, 1925, and went there with Mr. Lambert in my Ford car. There was another car behind us but I did not know who was in it. Mr. Lambert did

(Testimony of Otto Moses.)

not examine me for liquor before I went into the gas station. He gave me a five dollar [27] bill and I went in and bought a pint of moonshine, paying two dollars for it. He gave me three dollars back, together with the liquor which I gave to Lambert. I did not have any liquor when I went in. The agent searched the place afterwards.

Cross-examination.

I do not know the day of the week or the month; it was about four months ago. I never saw Lambert before—I am an Indian. I live at Snoqualmie which is about 40 miles from Enumclaw. I first met Lambert that day in the jail at Sumner, which is near Tacoma. I was locked up in jail for being drunk. Lambert came to the jail and took me out in the afternoon and told me that if I would go and get liquor they would free me. I took my car and drove Lambert to a point about 100 feet past the gas station and Lambert remained in the car. The other men stayed in the other car about 100 yards past the gas station. The five dollars was given to me at Sumner and I had a few dollars of my own in addition. They did not search me in the jail and Lambert did not search me after he got me out of jail. I went into the gas station and bought a package of cigarettes for which Pete charged me fifteen cents. I work in a logging-camp at Snoqualmie. I drove from Snoqualmie to Sumner the night before. After I got the bottle they told me to go home.

(Testimony of Otto Moses.)

Redirect Examination.

I saw Pete Chorak the day before.

Q. What was the occasion of seeing him at that time?

Mr. DORE.—I object as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Q. What happened when you were down there the day before?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial. [28]

The COURT.—Overruled.

Mr. DORE.—Desire an exception.

The COURT.—Note it.

A. Buying whiskey.

Mr. DORE.—Ask to have that stricken and the jury instructed to disregard it; it is not alleged in the indictment.

The COURT.—Proceed.

Mr. DORE.—I made an objection, and move it be stricken and the jury instructed to disregard it.

The COURT.—Let it stand for the present.

Mr. DORE.—I desire an exception.

The COURT.—Let it stand for the present.

Mr. DORE.—Will you note an exception.

The COURT.—Yes.

Q. You testified on cross-examination,—

Mr. DORE.—Do I understand by that I am to renew this; is this motion denied, or is the Court reserving its decision?

(Testimony of Otto Moses.)

The COURT.—I said it may stand; that means it may stand for the present.

Mr. DORE.—Note an exception.

Q. I will ask you if the liquor you got drunk on was the liquor you purchased from Mr. Chorak the day before?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. DORE.—Ask that the jury be instructed to disregard any inference, —

Mr. HOAR.—Counsel seeks to show he was drunk,—[29]

The COURT.—The jury will disregard the answer about the liquor he got the day before on which he got drunk.

Q. Did you tell the agents where you got the liquor upon which you became drunk.

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, and hearsay.

The COURT.—He may answer whether he did, or not.

Q. (By the COURT.)—Did you, or didn't you?

Mr. DORE.—Desire an exception.

Q. (By Mr. HOAR.)—Did you tell him where you got the whiskey?

Mr. DORE.—Desire an exception.

A. Yes, sir, I did.

Mr. DORE.—Is the exception noted?

The COURT.—Yes, note an exception.

TESTIMONY OF I. H. HORTON, FOR THE GOVERNMENT.

I. H. HORTON, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am the City Marshal of Sumner. I saw the defendant at his gas station on the 10th of May, 1925. Ballinger, Lambert and Carr were with me together with Moses. I first saw Moses about five o'clock in the morning at Sumner asleep in his car. Moses went into the gas station and came out with a bottle of moonshine whiskey. Prior to the time D. Moses went in he had been given a five dollar bill, which was found in the till. Government's Exhibit No. 1 is the five dollar bill found in the till. Afterwards the agents searched the place and the defendant was arrested.

Cross-examination.

The five dollar bill was given to the Indian at Sumner. He drove his own car up to the gas station with Lambert. [30] The five dollar bill was given to him by Lambert. Nobody searched him. He drove 100 yards past the gas station. Moses was in the gas station probably 15 minutes. I saw him go into the gas station and come out. The Indian was not searched when he came out.

Redirect Examination.

There were some small glasses and empty bottles

(Testimony of I. H. Horton.)
found behind the counter in the defendant's place of business.

Recross-examination.

Mr. Lambert took the bottles along.

TESTIMONY OF HOWARD E. CARR, FOR THE GOVERNMENT.

HOWARD E. CARR, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a carpenter's helper by trade and on the 10th of May, 1925, I was driving for the federal prohibition agents in Tacoma. On May 10th, 1925, I visited the gas station of the defendant. I saw Moses go in the premises and come out with a pint of moonshine whiskey. Government's Exhibit No. 1 is the bottle that Moses gave Lambert when he came out of the gas station. I assisted in searching the gas station and behind the soft-drink bar some empty bottles were found out of which we procured an ounce of moonshine whiskey. Government's Exhibit No. 2 is the liquor that was obtained by draining the bottles from behind the counter. Government's Exhibit No. 3 is the glasses found on the bar when we went in. Government's Exhibit No. 4 is the five-dollar bill that was found in the till.

(Testimony of Howard E. Carr.)

Cross-examination.

The Indian gave the change to Lambert. He had $1.40 when he was searched in Sumner. Horton, Ballinger, Lambert and myself were present when he was searched. I saw the Indian come out of the [31] gas station with a bottle in his pocket and hand it to Lambert. Back of the gas station was a store where candy, tobacco and soft-drinks were sold. We found four or five flasks and emptied the contents into a bottle.

TESTIMONY OF RICHARD A. LAMBERT, FOR THE GOVERNMENT.

RICHARD A. LAMBERT, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Agent. I know the defendant who operates a gas station near Enumclaw. I visited the gas station on the 10th of May, 1925, in company with Roy Bollinger, Marshal I. H. Horton, Howard Carr and Otto Moses. I stopped the car about 40 feet west of the gas station and across the road from the gas station. Before we left Sumner I searched Moses. He did not have any liquor, he had $1.75 and spent 35¢ for oil for his Ford car, that left him $1.40. When I arrived at the gas station I gave Moses a five-dollar bill and Moses went into the gas station. The de-

(Testimony of Richard A. Lambert.)

fendant went out the back door and into the woods and came back with a bottle in his left-hand pants pocket and soon after Moses came out and over to the Ford car where I was sitting and handed me $3 in change and also took from his pocket the pint of moonshine, then I sent him home. We then searched the gas station which had in connection with it a soft-drink bar behind which we found several pint flasks and in each flask was a small amount of moonshine whiskey. The six pint flasks we drained into one pint flask. Behind the bar were several glasses. The five-dollar bill was found in the cash register. In making a search of the direction where the defendant went into the woods, we found no whiskey. Government's Exhibits Nos. 1 and 2 is the whiskey that was drained from the six flasks and the bottle the Indian brought out to the car. Government's Exhibit No. 3 is the glasses found behind the bar and Government's [32] Exhibit No. 4 is the five-dollar bill.

Cross-examination.

I searched the Indian at Sumner and he had $1.75 on him. We found no liquor on the premises except the dregs out of these empty bottles.

TESTIMONY OF C. W. KLINE, FOR THE GOVERNMENT.

C. W. KLINE, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

Admitted that the contents of the bottles contained more than one-half of one per cent of alcohol by volume, and fit for beverage purposes.

TESTIMONY OF SAMUEL E. LEITCH, FOR THE GOVERNMENT.

SAMUEL E. LEITCH, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am the Deputy Clerk of the District Court for the Western District of Washington, Northern Division and have charge of the records of this court and have the original sentence and judgment in cause No. 7971 as to Pete Chorak.

Q. Will you read that judgment.

A. (Reading:) "United States of America, Plaintiff, vs. Pete Chorak, Defendant, No. 7971. Sentence. Comes now on this 15th day of November, 1923, the defendant, Pete Chorak, into open court for sentence, and being informed by the Court of the charges herein against him, and of his conviction of record herein, he is asked whether he has

(Testimony of Samuel E. Leitch.)

any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. [33]

WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act, and that he be punished by being confined in the King County jail, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for a period of four months, and the defendant, Pete Chorak, is now hereby remanded into the custody of the United States Marshal to carry this sentence into execution."

Q. That sentence does not seem to show the count upon which he was convicted.

Mr. DORE.—You can't correct a judgment by going back to a verdict.

The COURT.—Let him answer.

A. The verdict does not seem to be in this file just now.

The COURT.—Well, we ought to have it.

Q. Can you secure the balance of the records here. We have charged a prior conviction and sale; there is one conviction and sale charged.

A. I can determine that from the minute entry.

Q. Will you secure that minute entry.

A. I don't know how long it will take to get this verdict.

Mr. DORE.—I will make an objection on the

(Testimony of Samuel E. Leitch.)

ground you can't amplify a judgment or correct it or explain it; it is a final judgment.

The COURT.—Overruled.

Mr. DORE.—Note an exception.

Q. Will you please secure that. [34]

A. The defendant *pleaded in* that case, there was no trial; the docket entry shows an arraignment and plea.

Mr. DORE.—I still have an objection running to this, and an exception noted.

Q. Have you an appearance docket of this court?

A. I have.

Q. How is that docket kept? From what are those notations made.

Mr. DORE.—I object as incompetent, irrelevant and immaterial.

The COURT.—Proceed.

Mr. DORE.—Note an exception.

A. By filing an information or indictment the case is docketed, and the names of the defendants entered in this docket.

Q. (By the COURT.) What is that, the appearance docket?

A. The appearance docket.

Mr. DORE.—Made by the Clerk. I want an exception to this.

The COURT.—Objection sustained; that don't help us any.

(By Mr. HOAR.)

Q. Will you read the indictment in that cause to the jury.

(Testimony of Samuel E. Leitch.)

Mr. DORE.—I object as incompetent, irrelevant and immaterial; an attempt to inject matters not within the issue, and matters that are prejudicial under the condition of the record; incompetent at this time.

The COURT.—Objection sustained. The information charges possession and sale and manufacture, etc., and the Government has not designated any particular count.

Mr. HOAR.—It says sale; the sentence does not indicate the count. [35]

Mr. HOAR.—The Government is taken by surprise in this matter. I ask that the case be continued until this afternoon to give the Government a chance to produce those records.

The COURT.—Denied; no surprise. The records have always been here; you should have checked it up before.

Mr. HOAR.—I am making a demand now that the Clerk produce the minute entries entered upon the 15th day of November, 1923, showing what transpired in the case of United States vs. Pete Chorak.

Q. (By the COURT.) Can you get it?

A. Your Honor, as I stated before, I have the clerks looking for it, that is the best I can do at this time.

The COURT.—I am informed the journal is at the bindery at the direction of the Attorney-General. We will take a recess for fifteen minutes.

(After recess.)

(Testimony of Samuel E. Leitch.)

Q. (By Mr. HOAR.) Have you the minute entries made by the Clerk of the District Court of the Western District of Washington, Northern Division, on the 15th day of November, 1923?

A. I have the clerk's entry on the court journal made from the minute entry, made by the Clerk in the courtroom.

Q. In the case of the United States vs. Pete Chorak, No. 7971, will you read the journal entry?

Mr. DORE.—I object as incompetent, irrelevant and immaterial; not a proper way to plead it; it would not make any odds what the other entry shows, or what the man did, as it was,—

The COURT.—Read the record. Overruled.

Mr. DORE.—Note an exception. And also as being too broad and [36] containing matters extraneous to the case and prejudicial.

The COURT.—Proceed.

Mr. DORE.—Note an exception.

A. (Reading:) "United States of America, Plaintiff, vs. Pete Chorak and John Prkut, Defendants, No. 7971. Arraingment and Plea. Now on this 15th day of November, 1923, the above-named defendants came into open court for arraignment. Both defendants waive the presence and appointment of an attorney, and say that their true names are Pete Chorak and John Prkut. Whereupon the information is explained by the Court, and each defendant enters his plea of guilty. Upon motion of the U. S. Attorney Counts I, II and IV are dismissed, and sentence is passed at this time."

(Testimony of Samuel E. Leitch.)

Q. (By the COURT.) Which one of the counts?

A. It does not say, just eliminates Counts I, II and IV and dismissed them, leaving Count III.

Q. (By Mr. HOAR.) Handing you the original information in cause No. 7971, United States District Court for the Western District of Washington, Northern Division, I will ask you, Mr. Leitch, to read Count III thereof.

Mr. DORE.—I object as incompetent, irrelevant and immaterial; not the proper way to prove it.

The COURT.—Overruled.

Mr. DORE.—Note an exception.

A. (Reading.) "Count III: On the 29th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-three near the Town of Enumclaw, in King County, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Pete Chorak and John Prkut, then and there being, did then and there knowingly, wilfully and unlawfully sell certain intoxicating [37] liquor, to wit, fifty (50) gallons of certain liquor known as distilled spirits, and ten (10) gallons of a certain liquor known as wine, then and there containing more than one-half of one per centum of alcohol by volume, and fit for use for beverage purposes, a more particular description of the kind and amount being to the United States Attorney unknown, and which said sale by the said Pete Chorak and John Prkut, as aforesaid, being then and there unlawful and prohibited by the Act of Congress passed Oc-

(Testimony of Samuel E. Leitch.)

tober 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

TESTIMONY OF W. M. WHITNEY, FOR THE GOVERNMENT.

W. M. WHITNEY, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Legal Advisor. The defendant is the same Pete Chorak who is named in cause No. 7971, United States vs. Pete Chorak.

Government rests.

The defendant challenges the sufficiency of the evidence to sustain a verdict and moves for a directed verdict on counts II and III. The motion is denied. Exception allowed.

TESTIMONY OF PETE CHORAK, IN HIS OWN BEHALF.

PETE CHORAK, the defendant, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

I owned the gas station between Enumclaw and Auburn about four days when I was arrested. It consists of a gas station right in front of the store, and a store about 25x30. There is two acres of

(Testimony of Pete Chorak.)

[38] land in the piece. The Indian came into the store on May 10th, 1925, and wanted a package of cigarettes which I gave him, he gave me a five dollar bill and I gave him $4.85 in change. He asked me where the lavatory was and I told him to go right through the back room out into the woods. He went back into the woods and I did not see him again until after I was arrested. I was arrested after serving a couple of cars with gas and oil about 15 or 20 minutes. The empty bottles found under the counter were bottles I had picked up on the grounds where people had been camping and I figured to sell them to the junk man. I get a dollar a case for pop bottles. All they found were the dregs from these six flasks.

Cross-examination.

There was a bunch of bottles by the counter, I do not know how many that I had picked up around the place. Prior to the 6th of May, 1925, I was working in a mine for the Black Carbon Coal Company at Morristown, Washington. I had nothing to do with this gas station prior to May 6th, 1925. I bought it from John Prkut and A. W. Davies. I never saw Moses before the day in question. I did not see him the day before. When he came into the gas station he asked for a package of cigarettes. Between the time that Moses was there and the time that I was arrested I served a couple of cars with gas and oil. Moses asked me where the lavatory was and I told him and he went back there. Lam-

(Testimony of Pete Chorak.)

bert came in and said he was a Federal Officer and asked about the five-dollar bill. I said an Indian comes in and wants a package of cigarettes, I gave it to him and gave him the change and said, "You are welcome."

During the argument of the Assistant United States Attorney the following occurred:

Mr. DORE.—I object to that; there is no testimony [39] that anybody was a Custom's Inspector in this case.

The COURT.—Confine yourself to the testimony.

Mr. HOAR.—(Resuming argument:) * * * The Marshal searched him in the jail and he had nothing on him.

Mr. DORE.—I object to that as not within the evidence: no such testimony as that is in the case.

The COURT.—Confine yourself to the testimony in the case.

Mr. HOAR.—The Marshal did so testify; I object to counsel interrupting on such frivolous matters as that. * * *

> "You recall the Indian told you yesterday that he had purchased whiskey from Mr. Chorak on the day before.

Mr. DORE.—I object to that and ask that the jury be instructed to disregard it. That was the testimony that was stricken out by the Court, and it is prejudicial; and I ask that the jury be instructed to disregard it.

The COURT.—The jury will disregard it.

Mr. HOAR.—I demand the right to state what the witnesses testified to.

The COURT.—Proceed with your argument.

Mr. HOAR.— * * * "He told you he had been there the day before,—

Mr. DORE.—Same objection. I have the record here. I ask that the jury be instructed to disregard that. [40]

Mr. HOAR.— * * * "That he got drunk on whiskey he bought from Chorak. He said he purchased whiskey from Chorak."

Mr. DORE.—I ask that the jury be instructed to disregard that remark.

Mr. HOAR.—I will not press it; it is there.

Mr. DORE.—I object to that remark, and ask that the jury be instructed to disregard it as improper argument.

The COURT.—Proceed with the argument.

Mr. DORE.—He said he would not press it, but it is there; that is improper argument.

The COURT.—Proceed.

(Opening argument concluded. Argument by Mr. DORE.)

(The following occurred during the closing argument:)

Mr. HOAR.— * * * "The Marshal told you that the Indian had a bottle with a small amount of liquor in the morning,—

Mr. DORE.—No such testimony in the case; I ask that the jury be instructed to disregard it.

The COURT.—Oh, Mr. Dore.

Mr. DORE.—I am making a record here; I want to note my exception to this improper argument.

The COURT.—Proceed.

Mr. DORE.—Note an exception. [41]

At the conclusion of the argument by respective counsel, the Court gave the jury the following oral.

INSTRUCTIONS OF THE COURT TO THE JURY.

Gentlemen of the Jury:

The defendant in this case is charged by this indictment in three counts: Count III charges him with having possession of one ounce of liquor known as distilled spirits. Count I charges him with the sale of twelve ounces of distilled spirits. The distilled spirits referred to in each count it is charged, contains an alcoholic content in excess of one-half of one per cent of alcohol by volume, and fit for beverage purposes. Count II charges the defendant with having been prior convicted of the sale of intoxicating liquor on the 29th [42] day of November, 1923. Count II is a part of Count I, and it is merely subdivided. The defendant cannot be found guilty of Count II unless he is found guilty of Count I, because if he is not guilty of Count I of the sale as charged, then Count II would be inoperative, because there is nothing upon which to predicate it. Count II is simply placed in the indictment because of the provision of the law which fixes the penalty for a sale of intoxicating liquor greater upon a second conviction than it is upon the first offense, and it makes it incumbent upon the United States Attorney to present to the

Grand Jury, if an indictment is returned, the fact that there was a former conviction, so that the Court then will fix a penalty in the manner which is regulated by this Act.

Now the defendant has pleaded not guilty to all of these counts in the indictment, and he is presumed innocent until he is proven guilty beyond every reasonable doubt.

You are instructed that it is against the law for a person to sell or to have in his possession intoxicating liquor as charged in this indictment. And you are the sole judges of the facts in this case, and you must determine what the facts are from the evidence and the circumstances which have been developed and detailed by the witnesses here. And if you are convinced from the evidence beyond every reasonable doubt that the defendant did sell this liquor, as charged in Count I in this indictment, then you will return a verdict of guilty. If you have a reasonable doubt in your mind as to whether he did sell it or not, then that doubt will be resolved in favor of the defendant, and a verdict of not guilty be returned. And the same may be said with relation to Count III.

Now on Count II, evidence has been presented here of the fact that the defendant was charged in this court heretofore with the sale of intoxicating liquor, and pleaded guilty, and a judgment [43] was entered upon that charge and plea. And if you find that this defendant is the same defendant that was charged in that case, and find that he did sell, or is guilty of Count I in this indictment, then

you will find him guilty likewise of Count II in the indictment.

Now you cannot find the defendant guilty in this case for sale because he has been convicted before; nor can you, in determining his guilt or innocence upon Count I take into consideration the fact that he pleaded guilty, or was convicted before of the sale of intoxicating liquor; that former conviction, or former case, only becomes material if you are convinced by the evidence established from the testimony with relation to that former conviction, that he did sell, as charged in Count I here.

Now with relation to Count III in this indictment, the witnesses on the part of the Government said they found,—you will conclude the fact from the evidence, I am merely referring in this fashion, to call to your mind the incident, not with a view of concluding what the fact is,—but the witnesses on the part of the Government have, in substance, testified that they found under the bar, I think they called it, in the place of business of the defendant some five or six bottles that contained some liquor, which they poured out of the several bottles into one bottle, and it is presented in evidence here. The defendant says that he found these bottles back of his place of business, and he told you that he had bought the place a short time before, and that some parties camped back of his premises, and after they left that he picked up these bottles and brought them in, and was going to wash them out and sell them to the junk man. If you believe or if there is a reasonable doubt in your mind with relation to

the fact that the defendant got those bottles in that fashion,—if he picked them up and brought the bottles in there, and they were merely dregs in the bottles, and not there for any other purpose, why then [44] I hardly think you could find him guilty upon Count III and if you find that to be the fact, or if the evidence raises a reasonable doubt in your mind with relation to that, whey then you will return a verdict of not guilty as to Count III. If, on the other hand, you believe that the quantity that was in these bottles was simply the part that remained after the others had been disposed of,—while there is no evidence here that anything of that kind occurred, yet all the circumstances would lead you to believe that the defendant was engaged in dispensing liquor there, and that these bottles had simply been used there, which the contents had already been disposed of, with the exception of what was in there, and this was left over in the ordinary routine of business there, then you would have a right to conclude, if you believe beyond a reasonable doubt that would be the fact, that the contents of these bottles were not merely dregs remaining in the bottles which had been picked up, but was simply the content that remained after the other had been taken out.

On the first count you will remember the evidence on the part of the witnesses for the Government, and likewise on the part of the defendant. As you have been heretofore instructed, you are the sole judges of the facts in this case. You are likewise the sole judges of the credibility of the witnesses

who have testified before you. Now in determining the weight or the credit you desire to attach to the testimony of any witness you will take into consideration all the circumstances surrounding the parties who have testified implicating the defendant; the reasonableness of the story of the several witnesses; the opportunity of the witnesses for knowing the things about which they have testified, and the interest or lack of interest in the result of this trial, and from all these determine where the truth is. What was the reasonable conduct of all of the parties; how did this Indian happen to go over to the place where they say the liquor was bought; what was the motive that inspired him to go there. [45] Then what was done, so far as the testimony discloses, after he got there,—what transpired, and just what did take place. Then the reasonableness of the conclusion with relation to the disclosures which have been made. There is evidence here that the Indian was in jail at Sumner, being placed in there for intoxication, and he told the witnesses upon the part of the Government where he got the liquor that made him intoxicated. I did not permit him to tell you or me where he got it, that would not have been proper. I think he did testify afterwards where he did get it, but I ask you not to consider his answer, and ask you now not to consider the answer that he gave as to the place where he got it; that is the name of the person from whom he got it; but you have a right to consider, if you did believe the officers of the Government, where he got it. Now then what did the

parties do when Mr. Lambert and the other parties offered by the Government took the Indian and went up to the place of business of the defendant; that they gave the Indian $5.00 when they left Sumner, and asked him to go in; and then the Indian took the money; they marked it; they say they examined him; the Indian says they did not examine him; one of the other witnesses said they did not examine him. Lambert rode with him in the car from Sumner to the place of business of the defendant. He went in there and the officers were out in the automobile about one hundred feet away; they saw him go in, and they saw him come out. He came out with a bottle of whiskey, or liquor, and returned $3.00; $2.00 is what he testifies he paid for the liquor. The defendant says that he did not come in; that he bought some cigarettes for fifteen cents, and gave him a $5.00 bill and he gave him $4.85 back in change; the Indian said he did buy cigarettes and paid him fifteen cents. The Indian, I believe it is conceded, testified, and I don't know that it is denied, had $1.40. The contention of the defendant is that he did not sell this liquor, to him; that the Indian [46] either had it when he drove out from Sumner, or that he got it somewhere other than the defendant's place. The defendant says, if I remember the testimony correctly, that the Indian, after he bought the cigarettes, or before, went into the lavatory before he returned to the automobile.

Now what is the logical and the reasonable conclusion to be drawn from all this testimony?

Would the agent of the Government, under the circumstances disclosed here, give the Indian $5.00 and send him into this place to see whether this defendant was violating the National Prohibition law, and not satisfy himself before he went in that he did not have any liquor on his person, at least a bottle such as is in evidence here? Is it reasonable to conclude that the Indian had this liquor in his pocket when he got out of the jail in Sumner? Now, if he did not get this at the defendant's place of business under the testimony, then he must have had it in his pocket when he was arrested for drunkenness at Sumner, when he was put in jail, and when he was taken out, and when these officers gave him the $5.00 to go in and see whether this defendant was violating the law. Or did he find it in the defendant's lavatory, and the defendant not know that it was there. If he found it in the lavatory, and the defendant had placed it there then, of course, the defendant would not be guilty of sale. So these are matters you will have to determine as reasonable, fair-minded men.

Now these witnesses who have testified, some of them at least, are officers of the Government, they are in the employ of the Government. It is their sworn duty to ferret out persons who violate this law, and get evidence with relation to it, and present it to the court. Now then, in the presentation of this evidence did they impress you as being fair-minded, reasonable-minded men; was the story which they told fair, or did it impress you as coming from a prejudiced source? Did they deliberately perjure

themselves with relation to the search [47] and sale, or are they honestly mistaken? Determine that.

Now the defendant is interested, because if he is found guilty he must be punished; now then, would he, for the purpose of evading the penalty of the law frame his testimony so as to evade the responsibility which the law fixes, or to place a statement before you, or develop a condition which would raise in your minds a reasonable doubt? You will determine this as twelve fair-minded men, with a view of administering justice as nearly as it may be done, giving the defendant a square deal, and likewise the Government. As I have heretofore told you, the Government does not want this defendant convicted if he is not proven guilty beyond every reasonable doubt, but if he is guilty then he ought to be convicted.

I think in weighing the testimony likewise you will take into consideration the intelligence of the Indian who testified, in so far as that has been developed from the examination here. As to his understanding of the terms, and the language employed in his examination. You observed, perhaps, that some questions had to be placed in very simple language so that he could understand them. To what extent did he understand the language that was employed in his examination, and construe the language employed in harmony with the actual circumstances that are developed to your minds, beyond any question of doubt as to the conduct of the parties, what was actually done, and so far as the direct

and positive testimony discloses, and then conclude what the ultimate fact is. You will conclude this upon the direct and positive testimony, as well as the circumstances which have been developed.

Circumstantial evidence is competent, but the circumstances must be consistent with each other, consistent with the guilt of the defendant, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of his guilt. [48]

A reasonable doubt is just such a doubt as the term implies, a doubt for which you can give a reason. It must not arise from a merciful disposition or a kindly or sympathetic feeling, or a desire to avoid performing a possible disagreeable duty; it must be a substantial doubt such as an honest, sensible and fair-minded person might with reason entertain, consistently with a conscientious desire to ascertain the truth and perform a duty. A juror is satisfied beyond a reasonable doubt if from a fair and candid consideration of the entire evidence he has an abiding conviction of the truth of the charge. It is such a doubt as a man of ordinary prudence, sensibility and decision in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at his conclusion; a doubt which is created by the want of evidence, or it may be by the evidence itself. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the truth of the charge.

Have I covered the case? Are there any exceptions?

Mr. DORE.—I want to note an exception to the instruction where you told the jury there was some testimony in the case that the Indian told the officers where he got the liquor, on the ground there is no such testimony in the record.

The COURT.—My recollection is that the witness was asked whether he told the officers where he got the liquor, and I permitted him to say, "Yes." Now if that is before you you will consider it, and if not you will disregard it. You will determine this case solely upon the evidence which has been presented, not from anything that I have said, but from what the witnesses have said and the circumstances which have been developed here.

The verdict is in the usual form; before the word "guilty" is a blank, in which you will write "is" or "not"; and if [49] you find upon Count I that the defendant is not guilty of Count I, then you will find him not guilty of Count II.

It will take your entire number to agree upon a verdict; and when you have all agreed you will cause it to be signed by your foreman, whom you will elect immediately upon retiring to the jury-room.

You may now retire.

And now, in furtherance of justice, and that right may be done, the said defendant, Pete Chorak, tenders and presents to the Court the foregoing as his bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed

and signed and sealed by the Court and made a part of the record in this case.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 29, 1925.

Acceptance of service of within bill acknowledged this 30 Oct., 1925.

C. T. McKINNEY,
Attorney for Ptff.

Certified as correct.

JEREMIAH NETERER,
U. S. Dist. Judge.

Dec. 1st, 1925.

[Endorsed]: Filed Dec. 1, 1925. [50]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following:

Information.
Plea.
Record of trial and impaneling jury.
Verdict.
Motion in arrest of judgment.
Motion for new trial.

Order denying motion for new trial.
Judgment and sentence.
Petition for writ of error.
Assignments of error.
Order allowing writ of error and fixing amount of bonds.
Appeal and bail bond.
All orders extending time for filing bill of exceptions.
All orders extending time for filing record. [51]
Bill of exceptions.
Writ of error.
Citation.
Defendants' praecipe.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Oct. 29, 1925. [52]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 52 inclusive, to be a full, true, correct and complete

copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [53]

Clerk's fees (Act of February 11, 1925), for making record, certificate or return, 122 folios at 15¢	$18.30
Certificate of Clerk to transcript of record, with seal	.50
Total	$18.80

I hereby certify that the above cost for preparing and certifying record, amounting to $18.80 has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation in this cause issued.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 9 day of December, 1925.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [54]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before the Honorable Jeremiah Neterer, one of you, between Pete Chorak, the plaintiff in error, and the United States of America, the defendant in error, a manifest error happened to the prejudice and great damage of the said plaintiff in error, as by his complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United

States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at the said city of San Francisco within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, [55] the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 29 day of September, 1925, and of the Independence of the United States one hundred and forty-ninth.

[Seal] ED. M. LAKIN,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By S. M. H. Cook,
Deputy. [56]

Acceptance of service of the within writ acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed Sep. 29, 1925. [57]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said Pete Chorak is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington,

Northern Division, this 29th day of September, 1925.

JEREMIAH NETERER,
United States District Judge.

[Seal] ED. M. LAKIN,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By S. E. Leitch,
Deputy. [58]

Acceptance of service of within citation acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed Sep. 29, 1925. [59]

[Endorsed]: No. 4841. United States Circuit Court of Appeals for the Ninth Circuit. Pete Chorak, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed April 17, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No._____

PETER CHORAK, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Defendant in Error

THOS. P. REVELLE
United States Attorney

C. T. McKINNEY
Assistant United States Attorney

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No.----------

PETER CHORAK, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Defendant in Error

STATEMENT OF CASE

Witnesses on behalf of the government testified that they bought liquor from the plaintiff on the 10th day of May, 1925, at his place of business, which was ostensibly a gas station near Seattle, and that certain liquor was found there which was gathered

from a number of bottles. The defendant was also charged with a prior conviction of sale.

ARGUMENT

I.

The first assignment of error raises the question of previous acts of the defendant. A careful reading of the testimony of the witness of the government will show this contention to be erroneous. Counsel for the defense proved by his cross-examination that the witness had been drunk the day before he called upon the defendant, and the only thing proven on redirect was the fact that he told the agents where he got the liquor, and the testimony does not show that the witness got it from the defendant. The jury was instructed to disregard the question that was propounded the witness, and it was never answered. There was plainly no error in sustaining the objection. Consequently the authorities cited by counsel are not in point.

II.

The next assignment of error raised is the proof of the prior conviction. The facts show that the records of the clerk did not show what count in cause 7981 the defendant had been previously convicted of,

and consulted the minutes he had made in court and they showed that counts I, II, and IV had been dismissed, and the defendant had been sentenced upon the other, then the clerk read the only remaining count, which charged sale. There is no given way that the previous conviction must be proved, the law only requires that it be proved. It was proven that he had been convicted of sale, which count of the previous indictment was read, and that was sufficient. The court could not sentence a defendant, and he could not plead guilty to nothing, consequently he must have pleaded guilty to sale, and that is what the record reveals in this case. No judgment was corrected, but the clerk was permitted to use his original notes made in the court room at the time of the sentence of the defendant on the previous case.

III.

The question raised by assignment No. V is fully covered in the instructions of the court, Tr. 45, in which the court directed the jury to entirely disregard the matter. It certainly was not prejudicial to the defendant. Counsel for the defense did more to prejudice his client's rights than did the government by directing the jury's attention to the matter so forcibly.

Berlin v. U. S., 142, 497 at 498, par. 5.

IV.

The court instructed the jury if the liquor which was found was dregs, which had been brought in by the defendant he would not be guilty, but if the liquor which was found was some that had remained in the bottle afterwards which he knew about he would be guilty. I think the court's instruction was proper upon this proposition, and clearly stated the law. The defendant admitted having them in his possession, and if it was liquor fit for beverage purposes, then he would be guilty, no matter how small the quantity. A man may have had a thousand bottles, and disposed of them all, except a half of a bottle, and would still be guilty. The only question was: Was it fit for beverage purposes? This was testified to by Mr. Kline, agent for the government, Tr. 31, and stands undenied.

V.

The court's instructions are set out fully in the Transcript beginning at page 41, and when read completely it is evident that they are very fair to the defendant.

Respectfully submitted,

THOS. P. REVELLE,
C. T. McKINNEY.
Attorneys for Defendant in Error.

No. 4841.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PETER CHORAK,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

PETITION FOR REHEARING.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Plaintiff-in-Error.
Seattle, Washington.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE.

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PETITION FOR REHEARING.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Plaintiff-in-Error.
Seattle, Washington.

Comes now the plaintiff-in-error and respectfully petitions this court for a rehearing in the above-entitled cause.

The petitioner was charged with the sale of a pint of whiskey on May 10, 1925. Testimony as to a sale at another time was introduced against him.

In the opinion it is stated that ordinarily this testimony would have been incompetent and that this case forms no exception to the rule. The opinion then says that the only testimony offered in support of the prior sale was the testimony of the witness who testified to the second sale and, following the case of *Stubbs vs. United States,* 1 Fed (2d) 837, this is held not to be erroneous.

We respectfully contend that the doctrine announced in the *Stubbs* case is not founded on reason. Our understanding of it is that, where a sale is alleged in the indictment to have taken place on a certain date, and the jury convicts the person of that sale, the testimony given by the chief witness as to other sales, as long as they are not corroborated, are permissible. The reason being advanced that if the jury discredits the witness as to the sale

on the date alleged in the indictment, the jury would naturally discredit the testimony as to prior sales.

Such a statement overlooks the fact that it may have been the uncorroborated testimony as to the prior sale that caused the jury to place credence upon the testimony as to the sale specified in the indictment. It may be that the jury reasons that the witness testifying to so many prior sales must necessaril ybe telling the truth, and decide because of this fact to believe the witness as to the sale on the date laid in the indictment. There might be some outstanding fact in connection with the prior sale which convinces the jury that the witness is entitled to belief where credence would be denied if the testimony were confined to the date specified in the indictment.

Of course unless the defendant is convicted he can never complain of the admission of collateral offenses against him. To say that such evidence may be admitted as long as it is uncorroborated is a rule of evidence that had its birth in the case of *Stubbs vs. United States,* 1 Fed. (2d) 837.

We respectfuly contend that the rule against

the admission of collateral offenses, made for the protectionof t he defendant, ceases to operate if the doctrine of the *Shubbs* case is to be maintained.

There are very few cases where there is any testimony as to prior collateral offenses, except by the main prosecuting witness. That this is true is somewhat borne out by the fact that the question has only been called to the attention of this court twice in the last five years, viz., in the *Stubbs* case and in this case.

We respectfully contend that the doctrine is erroneous; that it has no foundation in authority and no support in reason.

Respectfully submitted,

JOHN F. DORE,

F. C. REAGAN,

Attorneys for Plaintiff-in-Error.

I hereby certify that in my judgment this petition for rehearing is well founded, and that it is not interposed solely for the purpose of delay.

JOHN F. DORE,

Attorney for Plaintiff-in-Error.

No. 4857

United States

Circuit Court of Appeals

For the Ninth Circuit.

16

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED OF LONDON, ENGLAND,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF OREGON.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4857

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED OF LONDON, ENGLAND,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WILBUR, BECKETT, HOWELL & OPPENHEIMER, Board of Trade Building, Portland, Oregon,

For the Plaintiff in Error.

GRIFFITH, PECK & COKE, Electric Building, Portland, Oregon,

For Defendant in Error.

In the District Court of the United States for the District of Oregon.

PORTLAND ELECTRIC POWER COMPANY, a Corporation,

Plaintiff,

vs.

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

To the United States of America, Ninth Judicial District, to Portland Electric Power Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from date hereof, pursuant to writ of error filed in the Clerk's office of the

United States District Court for the District of Oregon, wherein said The Employers Liability Assurance Corporation Limited of London, England, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable CHARLES E. WOLVERTON, Judge of the United States District Court for the District of Oregon, this 6th day of April, 1926.

CHAS. E. WOLVERTON,
United States District Judge. [1*]

United States of America,
District of Oregon,—ss.

Due and timely service of the within citation and the receipt of a duly certified copy thereof, all at the city of Portland in the District of Oregon, is hereby admitted.

GRIFFITH, PECK & COPE,
By CASSIUS R. PECK,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 8, 1926. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

WRIT OF ERROR.

The United States of America,—ss.

The President of The United States of America, To the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Portland Electric Power Company, a corporation, plaintiff and defendant in error, and The Employers Liability Assurance Corporation, Limited of London, England, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and here held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Ap-

peals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 6th day of April, 1926.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: Filed April 6th, 1926. [3]

In the District Court of the United States for the District of Oregon.

July Term, 1924.

BE IT REMEMBERED, That on the 15th day of July, 1925, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit: [4]

In the District Court of the United States for the District of Oregon.

PORTLAND ELECTRIC POWER COMPANY, a Corporation,

Plaintiff,

vs.

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON ENGLAND, a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff and for its cause of complaint against the defendant complains and alleges:

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, organized and existing under the laws of Great Britain, is a subject of Great Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action exceeds Three Thousand Dollars ($3,000.00), exclusive of costs and interest.

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred Dollars ($7500.00) against damages resulting from bodily injuries [5] accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained. That attached hereto made a part hereof and marked Exhibit "A" is said contract of insurance.

V.

That said contract, except for the breaches of the defendant as hereinafter alleged, is now and has been at all times since April 29, 1922, in full force and effect, and this plaintiff has complied with each and every condition thereof by it undertaken.

VI.

That the freight elevator located in said Electric Building, and whereon and in connection with which

bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item 3 of the declarations of said Exhibit "A."

VII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floor of said elevator and the said walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit "A" under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit "A," to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative immediate [6] medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extend of $7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom.

IX.

That immediately upon the happening of said

accident, the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant refused so to do and denied any and all liability on account of or growing out of said accident.

X.

That upon the happening of said accident, the plaintiff incurred certain expenses for the imperative immediate medical and surgical relief of the said James A. Freeborough; that said medical and surgical relief was of the reasonable value of $500.00.

XI.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his said injuries, resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19, 1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XII.

That immediately thereafter, on February 19, 1924, this plaintiff delivered said complaint and summons to the defendant and requested it to *defendant* said suit in accordance with the terms and provisions of said Exhibit "A." [7]

XIII.

That thereafter, on February 23, 1924, this de-

fendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIV.

That the allegations of said complaint charging the negligence of this plaintiff as the proximate cause of his injuries were true, and the sum of $8,000.00 was a fair and reasonable compensation for the injuries and damages resulting to said James A. Freeborough from and on account of said accident.

XV.

That thereafter, acting in the best interest of both the plaintiff and defendant herein, this plaintiff as defendant in said suit, filed in said court and cause its confession, whereby it confessed judgment in the sum of $8,000.00 and thereafter on June ——, 1924, a judgment in the sum of $8,000.00 was duly entered in said cause in favor of said James A. Freeborough and against this plaintiff as defendant therein.

XVI.

That immediately thereafter this plaintiff demanded of the defendant that it satisfy said judgment to the extent of $7,500.00 and that it reimburse this plaintiff for said expense of $500.00, incurred by the plaintiiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its

denial of any and all liability arising or growing out of said accident.

XVII.

That upon the refusal of the defendant to settle and satisfy said judgment to the extent of $7,500.00, this plaintiff did, on July 10th, 1924, in the necessary protection of its property from sale upon execution, settle and pay said judgment [8] by the payment to the said James A. Freeborough of $7,500.00 in cash and by the delivery to him of an order for future surgical and medical service by the surgical and medical staff of this plaintiff.

XVIII.

That in so denying liability under said Exhibit "A" and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of $7,500.00, as provided by said Exhibit "A," and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of $7,500.00, as provided in said Exhibit "A," and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of $500.00, this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of $8,000.00; that the defendant

refuses to pay the plaintiff said sum of $8,000.00, or any part thereof.

WHEREFORE, this plaintiff demands judgment against the defendant in the sum of $8,000.00, with interest at the rate of 6% per annum from July 10th, 1924, together with its costs and disbursements herein.

GRIFFITH, LEITER & ALLEN,
Attorneys for Plaintiff. [9]

State of Oregon,
County of Multnomah,—ss.

I, R. W. Shepherd, being first duly sworn, depose and say that I am the Assistant Secretary of Portland Electric Power Company, a Corporation, plaintiff in the above-entitled action; and that the foregoing complaint is true, as I verily believe.

R. W. SHEPHERD.

Filed July 15, 1924. [10]

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION
— LIMITED —
of London, England

GENERAL LIABILITY POLICY.

(Hereinafter called the Corporation) hereby agrees with the Assured named in the Declarations attached hereto, and made a part hereof, as respects bodily injuries, including death at any time resulting therefrom, covered by this Policy and accidentally sustained by any person or persons, as follows:

Insurance Provided.

Agreement I.

(*a*) To settle or to defend in the manner hereinafter set forth against claims resulting from the liability imposed upon the Assured by law for damages on account of such injuries.

(*b*) To pay and satisfy judgments rendered against the Assured in legal proceedings defended by the Corporation and to protect the Assured against the levy of executions issued against the Assured upon the same, all subject to the limits expressed in Item 4 of the Declarations.

(*c*) To pay all expenses incurred by the Corporation for investigation, negotiation, and defense of any such claims or proceedings; the expense incurred by the Assured for such immediate medical or surgical relief as shall be imperative at the time any such injuries are sustained; all premiums on attachment and/or appeal bonds required in any such proceedings; all costs taxed against the Assured in any such proceedings; and all interest accruing before or after entry of judgment and up to the date of payment by the Corporation of its share of any judgment.

(*d*) The insolvency or the bankruptcy of the Assured shall not relieve the Corporation from the payment of such amount hereunder as respects any such injuries sustained before such insolvency or bankruptcy as would have been payable but for such insolvency or bankruptcy. If, because of such insolvency or bankruptcy, an execution against the Assured is returned unsatisfied in an action brought to recover damages on account of any such injuries sustained before such insolvency or bankruptcy by the Injured or by any other persons claiming by, through or under the Injured, then an action may be maintained by the Injured, or by such other persons claiming by, through or under the Injured, against the Corporation, subject to the provisions and the limits of this Policy, for the amount of the judgment in said action.

Service.

Agreement II. To serve the Assured,

(*a*) by inspection of the premises, the elevators and the machinery and appliances connected therewith covered by this Policy when and as deemed advisable by the Corporation, and thereupon to suggest to the Assured such changes or improvements as may operate to reduce the number or the severity of such injuries, and,

(*b*) by investigation of such injuries and by settlement or defense of any resulting claims in accordance with the provisions of this Policy.

Defense.

Agreement III. To defend as in this Policy provided in the name and on behalf of the Assured any suits or other proceedings alleging such injuries and demanding damages on account thereof which may at any time be instituted against the Assured on account of such injuries, although such suits, proceedings, allegations, and demands are wholly groundless, false or fraudulent.

Coverage.

Agreement IV. This Policy covers, except as provided in Agreement V., bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition.

Exclusions.

Agreement V. This Policy shall not cover injuries or death,

(1) caused to or by any person employed by the Assured (a) contrary to law, or (b) under fourteen (14) years of age, or (c) under sixteen (16) years of age if in charge of or operating any elevator; or,

(2) sustained by any person or persons while in, entering upon, or alighting from, the car of any elevator, or caused by the maintenance, the operation or the use of any elevator, or by goods, materials or merchandise while being carried thereon, or caused by the existence of the elevator well, shaft or hoistway thereof, or appliances, appurtenances, or attachments contained therein, or machinery directly connected therewith unless such elevator is specifically described in Item 3 of the Declarations; or,

(3) caused (a) by any horse or any draught animal, any motor or other vehicle (except hand-propelled vehicles on the said premises) owned, hired, or borrowed by the Assured, or (b) by any person while driving, loading, unloading or using the same, or (c) by any animal away from the said premises; or,

(4) caused by the consumption, the use, or the installation of goods outside of and away from the premises described in the Declarations; or,

(5) growing out of or due to the making of additions to, structural alterations in, or extraordinary repairs of the said premises unless a written permit is granted by the Corporation specifically describing the work and an additional premium is paid therefor;

(6) to any employee of the Assured under any Workmen's Compensation Act or Law.

Policy Period.

Agreement VI. This Policy covers only such injuries so sustained by reason of accidents occurring within the Policy period as stated in Item 2 of the Declarations.

Limitation of Liability.

Agreement VII. The Corporation's liability under this Policy is limited as expressed in Item 4 of the Declarations, and said limits shall apply to each elevator covered hereby. If there be more than one named in the Declarations as Assured the said limits shall be available to them jointly but not to more than one of them severally.

The Foregoing Agreements are Subject to the Following Conditions:

Basis of Premium.

Condition A. The premium for this Policy is as expressed in Item 3 of the Declarations except as this Policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration (by which term is meant all salaries, wages, earnings for overtime, piece work or contract work, bonuses or allowances, also the cash equivalent of all merchandise, store certificates, credits, board or any other substitute for cash) earned during the Policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations. At the end of the Policy period, the actual amount of the remuneration earned by all said persons during such period shall be exhibited to the Corporation, as provided in Condition "C" hereof, and the earned premium adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned premium thus computed is greater than the advance premium paid, the Assured shall immediately pay the additional amount to the Corporation; but if the earned premium thus computed is less, the Corporation will return to the Assured the unearned portion of the said advance premium paid; but in any event the Corporation shall retain the minimum premium stated in the Declarations.

The Employers' Liability Assurance Corporation, Limited,

OF LONDON, ENGLAND.

ELEVATOR ENDORSEMENT. (Form 2215.)

This Policy does not cover on account of injuries or death suffered by any person or persons, whomsoever, while in or entering upon or alighting from the car of any elevator or hoist, or by reason of the existence of the elevator well, shaft or hoistway thereof, or the appliances, attachments or appurtenances contained therein, or the machinery directly connected therewith, unless such elevator or hoist is specifically described in the Schedule of the Policy and a charge for same is included in the premium.

This Endorsement when countersigned by a duly authorized General Agent of the Corporation and attached to Policy No. ...27745.....issued to.....PORTLAND RAILWAY, LIGHT & POWER COMPANY..... shall be valid and shall form part of said Policy.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

SAMUEL APPLETON
Manager and Attorney for the United States

Countersigned at...Portland,...Oregon.....

this.....*day of*....April 23,...1923.....

by....JAMES McL. HOOD & CO.....

General Agent.

States.

Cancellation.

Condition B. This Policy may be cancelled at any time by either of the parties upon five days' written notice to the other party, and the effective date of such cancellation shall then become the end of the Policy period. If such cancellation is at the Corporation's request, the Corporation shall be entitled to the earned premium computed pro rata. If such cancellation is at the Assured's request, the Corporation shall be entitled to a premium based upon the short rates for the time this Policy shall have been in force, determined by the Short Rate Cancellation Table printed hereon; but in any event the Corporation shall retain the minimum premium stated in the Declarations.

Notice of cancellation mailed to or delivered at the address of the Assured as given in the Declarations shall be sufficient notice. The check of the Corporation mailed to or delivered at such address shall be a sufficient tender of any unearned premium, but no tender shall be required if the premium has not been paid.

Inspection of Premises and Examination of Books.

Condition C. The Corporation shall be permitted at all reasonable times to inspect the Assured's premises, elevators, elevator wells, shafts, hoistways, and all machinery, appliances and appurtenances connected with or contained in the same, and to examine the Assured's books and records at any time during the Policy period and within one year after the end of the Policy period for the purpose of determining the actual premium earned while this Policy was in force, and the Assured shall, whenever requested by the Corporation, furnish the Corporation with a written statement of the amount of remuneration earned by any of the persons referred to in Condition "A."

Notice.

Condition D. Upon the occurrence of an accident covered by this Policy, the Assured shall give immediate written notice thereof to the Corporation or its duly authorized Agent. The Assured shall give like notice with full particulars of any claim made on account of any such accident. If any suit or other proceeding mentioned in Agreement III. is instituted against the Assured on account of any such accident, the Assured shall immediately forward to the Corporation or its duly authorized Agent every notice, summons, or other process served upon the Assured.

Co-operation.

Condition E. The Assured, when requested by the Corporation, shall aid in effecting settlements, in securing evidence and the attendance of witnesses, in defending suits, and in prosecuting appeals, and shall at all times render to the Corporation all co-operation and assistance in the Assured's power. The Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at the Assured's own cost, or interfere in any negotiation for settlement or legal proceeding, without the consent of the Corporation previously given in writing, but the Assured may provide, at the expense of the Corporation, such immediate medical or surgical relief as shall be imperative at the time any such injuries are sustained.

Subrogation.

Condition F. The Corporation shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law in the Assured and/or in any other person claiming hereunder, against persons, corporations, associations or estates, and the Assured shall execute all papers required and shall co-operate with the Corporation to secure its rights.

Other Insurance.

Condition G. If the Assured has any other insurance applicable to a claim covered by this Policy, the Corporation shall not be obliged under this Policy to pay a larger proportion of or on account of any such claim than the limit of the Corporation's liability under this Policy, applicable to such claim, bears to the total corresponding limits of the whole amount of valid and collectible insurance.

Assignment.

Condition H. No assignment of interest under this Policy shall bind the Corporation unless the consent of the Corporation shall be endorsed hereon. If the death, the insolvency, or the bankruptcy of the Assured shall occur during the Policy period, this Policy during the unexpired portion of such period shall cover the legal representatives of the Assured, provided notice shall be given to the Corporation in writing within thirty days after the date of such death, insolvency or bankruptcy.

Changes in Policy.

Condition I. No Agreement or Condition of this Policy shall be waived or altered except by an endorsement attached hereto, signed by the Manager and Attorney of the Corporation for the United States; nor shall notice to any Agent, nor shall knowledge possessed by any Agent, or by any other person, be held to effect the waiver of, or n change in, any part of this Policy. Changes in the written portions of the Declarations made a part hereof may be made by an endorsement attached hereto, signed by the General Agent countersigning this Policy. Endorsements, when so signed and attached hereto, shall be construed as a part of this Policy.

Special Statutes.

Condition J. If any of the Agreements, Conditions, or Declarations of this Policy are at variance with any specific statutory provision in force in the state within which coverage is granted, such specific statutory provision shall supersede any such Agreement, Condition, or Declaration of this Policy inconsistent therewith.

Acceptance.

Condition K. The Assured by the acceptance of this Policy declares the several statements in the Declarations hereby made a part hereof to be true; and this Policy is issued upon such statements and in consideration of the premium as in this Policy provided.

In Witness Whereof, the Corporation has caused this Policy to be executed by its authorized Manager acting under power of Attorney, but this Policy shall not be in force unless countersigned by a duly authorized General Agent of the Corporation.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND.

By

Manager and Attorney for the United States.

Countersigned at [illegible], [illegible]

this [illegible] *day of April* [illegible], 19[illegible] *19*

[illegible]

General Agent.

This space is intended for the attachment of such endorsements as may be executed as in this Policy provided, and, when so executed and attached, they are to be construed as a part of this Policy.

This space is for the attachment of the Declarations as in this Policy provided, which, when attac
as a part of this Policy.

Attached to and forming
part of **POLICY NO. G. L.** 27745

GENERAL LIABILITY FORM.

The Employers' Liability Assurance Corporation, Limited,

of London, England.

SAMUEL APPLETON, UNITED STATES MANAGER, BOSTON, MASS.

DECLARATIONS

ITEM 1. Name of Assured PORTLAND RAILWAY LIGHT & POWER COMPANY

P. O. Address Electric Building, Portland, Oregon

The Assured is A Corporation
(State whether individual, copartnership, corporation, receiver or trustee.)

ITEM 2. The Policy period shall be from 12:01 o'clock A.M. APRIL 24th 1922,
to 12:01 o'clock A.M. APRIL 24th 1925, standard time, at the place
where this Policy has been countersigned.

ITEM 3. The Location of Insured Premises is (State Street, Number, Town and State of Each Building.)	The Premises are Occupied as (State the Purpose for which the Premises are used giving kind of Business if any.)	Estimated Floor Dimensions.	Number of Floors.	Estimated Street Frontage.	Estimated Remuneration of Employees.	Premium.
Electric Building at N.E. corner of Broadway and Alder Streets, including sidewalk surrounding same, Portland, Oregon	Office Building	100x100 Less 60x100	9 1	200	6000	Those engaged in the maintenance, care and upkeep of the building at .0$ per hundred

Location of Building where Elevator is Situated (State Street and Number of Each Building.)	Number of Elevators.	Number of Landings.	Location in Building.	Kind of Elevators. (State whether Passenger, Freight, Sidewalk, One-story, Private House, Hand Hoist, Moving Platform or Escalator, or Dumb Waiter, and whether Hydraulic, Electric, Steam or Plunger.)
as above	3	9	S.E. corner	Passenger and Freight Electric - Otis Elevator

Minimum Premium $ 132.20 **Total Premium** (one year Period) $ 506.30

When Policy Period is three years, the following computation shall apply:

Three year Period, **Gross Premium** $ 563.22 (%) discount for Period. **Net Total Premium** $506.30

Payable (1) **In Advance** $ (2) **1st Anniversary** $ (3) **2nd Anniversary** $

ITEM 4. **The Corporation's limit of liability for one person receiving bodily injuries shall be** SEVENTY FIVE HUNDRED AND 00/100 **Dollars** ($ 7500.00), **and, subject to the same limit for each person, the Corporation's total liability on account of any one accident causing bodily injuries to more than one person shall be** FIFTEEN THOUSAND & 00/100 **Dollars** ($ 15,000.00), **and, in addition, the sums provided to be paid in Agreement I, sub-section (c) of this Policy.**

ITEM 5. The interest of the Assured in the premises is Owner
(Owner, Lessee or Tenant.)

ITEM 6. The Assured manages the premises, except as follows: No exceptions

ITEM 7. The Assured occupies the premises, except as follows: No exceptions

ITEM 8. There is no elevator at any location designated, which is not disclosed above, except as follows: One sidewalk elevator and electric substation-in basement, 1st and 2nd floors-not covered

ITEM 9. The premises and all elevators have been accepted from the builders as satisfactory, except as follows: No exceptions

ITEM 10. Inspection reports and other notices and correspondence relating to inspection are to be mailed to the Assured at the address given above, or to
(If to the latter, it is by request of the Assured, who acknowledges such person as the proper agent for the purpose.)

ITEM 11. No Company has declined renewal of, or cancelled, insurance on this risk during the past three years, except as follows: No exceptions

2445A

Form 12462.

11

10

THE EMPLOYERS'
LIABILITY ASSURANCE
CORPORATION,
LIMITED,
OF LONDON, ENGLAND.

DIRECTORS.

The Rt. Hon. Lord CLAUD HAMILTON, Chairman.
ARTHUR DIGBY BESANT, Esq.
Sir JOSEPH O. BROODBANK.
Sir GORDON CAMPBELL, K.B.E.
HUGH D. FLOWER, Esq.
Sir RALPH C. FORSTER, Bart.
Lt.-Col. Sir SAMUEL HOARE, Bart., C.M.G., M.P.
W. H. MAUDSLAY, Esq.
FRANCIS E. J. SMITH, Esq.
Col. Sir EDWARD WARD, Bart., O.B.E., K.C.B., K.C.V.O.
Sir PHILIP H. WATERLOW, Bart.

SECRETARY.
W. J. RALPH.

GENERAL MANAGER.
W. E. GRAY.

UNITED STATES BRANCH.

ADVISORY BOARD.

WILLIAM D. BALDWIN, Esq.
(Chairman Otis Elevator Co.), New York.
WM. ALLEN BUTLER, Esq.
(Butler, Wyckoff & Reid), New York.
JOHN LOWELL, Esq., Boston.
FRANK O. WEBSTER, Esq. (Kidder, Peabody & Co.), Boston.

EXECUTIVE COMMITTEE.

HENRY M. ROGERS, Esq. (Lawyer.)
JOHN S. THOMAS, Esq. (Real Estate.)
CHARLES FRANCIS ADAMS, Esq.
CHARLES L. EDGAR, Esq. (Treasurer Harvard College.)
(President Edison Electric Illuminating Co.), Boston.

TRUSTEE.

THE NEW ENGLAND TRUST CO., Boston

SAMUEL APPLETON
Manager and Attorney for the United States
BOSTON, MASS.

GENERAL LIABILITY POLICY

No. G. L. 27745

THE EMPLOYERS'
LIABILITY ASSURANCE
CORPORATION
LIMITED
OF LONDON, ENGLAND

UNITED STATES BRANCH

SAMUEL APPLETON,
Manager and Attorney for the United States,
BOSTON, MASS.

Assured PORTLAND RAILWAY, LIGHT & POWER COMPANY.
Address PORTLAND, CALIFORNIA
Expires APRIL 24th, 1925
Premium, $ 506.90

JAMES McI. WOOD & CO.
GENERAL INSURANCE
Railway Exchange Bldg.
PORTLAND - - OREGON

SHORT RATE CANCELLATION TABLE

FOR A ONE YEAR POLICY

	Per cent. of Annual Premium		Per cent. of Annual Premium
1 day	2	50 days	28
2 days	4	55 "	29
3 "	5	60 "	30
4 "	6	65 "	31
5 "	7	70 "	36
6 "	8	75 "	37
7 "	9	80 "	38
8 "	9	85 "	39
9 "	10	90 " or three months	40
10 "	10	105 "	45
11 "	11	120 " or four months	50
12 "	12	135 "	55
13 "	13	150 " or five months	60
14 "	13	165 "	65
15 "	14	180 " or six months	70
16 "	14	196 "	75
17 "	16	210 " or seven months	75
18 "	16	225 "	78
19 "	18	240 " or eight months	80
20 "	17	255 "	83
25 "	19	270 " or nine months	86
30 "	20	285 "	88
35 "	23	300 " or ten months	90
40 "	26	315 "	93
45 "	27	330 " or eleven months	95
		360 " or twelve months	100

FOR A THREE YEARS' POLICY

	Per cent. of 3 Years Premium		Per cent. of 3 Years Premium
1 month	10	19 months	72
2 months	17	20 "	73
3 "	20	21 "	75
4 "	23	22 "	77
5 "	27	23 "	79
6 "	30	24 "	80
7 "	33	25 "	81
8 "	37	26 "	83
9 "	40	27 "	85
10 "	43	28 "	86
11 "	47	29 "	88
12 "	50	30 "	90
13 "	53	31 "	91
14 "	57	32 "	93
15 "			
16 "			
17 "			
18 "			

Cancellation.
Company at the request of party to whom policy was issued.

AND AFTERWARDS, to wit, on the 27th day of October, 1924, there was duly filed in said court an opinion in words and figures as follows, to wit: [12]

OPINION.

October 27, 1924.

GRIFFITH, LEITER & ALLEN, for Plaintiff.

WILBUR, BECKETT & HOWELL and E. K. OPPENHEIMER, for Defendant.

WOLVERTON, District Judge.—This is an action, on liability insurance, for injuries sustained by an employee of plaintiff in the building and premises described and mentioned in the policy. The covering clause of the policy is as follows:

> "Agreement IV. This Policy covers, except as provided in Agreement V., bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition."

The injury sustained was not on account of any of the excepted causes enumerated in Agreement V.

It is further provided that, "The foregoing Agreements are subject to the following conditions": among which is Condition "A," which recites, so far as essential here: [13]

> "The premium for this Policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration * * * earned during the Policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

Further provision is made by the same condition for adjusting the premium earned at the expiration of the policy period, and for payment or repayment, as the case may be, according as the earned premium may be greater or less than the advance premium paid.

Item 3 describes the premises as "Electric Building at N. E. corner of Broadway and Alder Streets, including sidewalk surrounding same." Such also is the building in which the elevators, three in number, are situated. Item 3 contains, under the caption "Estimated Remuneration of Employees," the numerals 6000, and on the margin, under the caption "Premium," the language, "Those en-

gaged in the maintenance, care and upkeep of the building at .05 per hundred."

The injured party, although in the employ of plaintiff, was engaged as an electrician in its repair-shop, operated at a place distant about one mile from the building and premises described in the policy.

The contention of the defendant corporation, which is presented by its answer to the complaint and plaintiff's demurrer thereto, is that the injured party was not one of the persons covered by the policy; it being argued that only such employees of the plaintiff as were engaged in the maintenance, care and upkeep of the building described in Item 3 were so covered. This depends entirely upon the proper interpretation of the provisions of the policy. [14] There is no ambiguity which needs elucidation extrinsically as an aid to interpretation. The covering clause particularizes bodily injuries, etc., "sustained by any person or persons while within or upon the premises described in the Declarations." The language is most comprehensive—"any person or persons." That the injured party was within the premises described in the declarations when hurt is not questioned.

Condition A is intended wholly as a regulation for adjusting the premium to be paid for the issuance of the policy.

It is not doubted that the policy covers members of the general public, regardless of any employment by plaintiff. The premium for this is as expressed in Item 3. But the premium for cover-

age upon plaintiff's employees is based upon a different estimate, namely, the remuneration earned by all employees of plaintiff during the policy period, engaged in the business operations as expressed in such Item 3, that is to say, the maintenance, care and upkeep of the building designated, at .05 per hundred. While not all of plaintiff's employees were engaged in the maintenance, care and upkeep of the building, Condition A does not avail to vary or modify the engagement of Agreement IV, which specifies a coverage of bodily injuries sustained by any person or persons while within or upon the premises. This plainly and obviously covers, not only the general public, but employees of plaintiff as well, whether engaged at the time in the maintenance, care and upkeep of the building or not. It is reasonable to assume that the parties considered that .05 per hundred of the entire remuneration for the policy period, of those employees so [15] engaged was adequate as a premium for coverage upon all of plaintiff's employees, including those not so engaged. But, however that may be, Condition A treats of a different subject from that treated by Agreement V, the one relating to an adjustment of premium and the other to the persons or subjects covered by the policy of insurance. I find no ground for inference that, because the basis stipulated for ascertaining the premium which was to govern as to plaintiff's employees did not include all such employees, it was intended that none of such employees were to be embraced by the covering clause

except those engaged in the maintenance, care and upkeep of the building designated. The clauses themselves are separate and distinct, and treat of separate and distinct subjects, and must be so considered. Thus considered, the party injured, though an employee of plaintiff not engaged in the maintenance, care and upkeep of the building, was embraced by the covering clause of the policy.

Demurrer to the answer will be sustained. [16]

AND AFTERWARDS, to wit, on the 2d day of December, 1924, there was duly filed in said court an amended answer, in words and figures as follows, to wit: [17]

AMENDED ANSWER.

Comes now above-named defendant and for an amended answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Denies each and every allegation therein contained and the whole thereof unless herein specifically admitted.

II.

Admits the allegations contained in Paragraph I of plaintiff's complaint.

III.

Admits the allegations contained in Paragraph II of plaintiff's complaint.

IV.

Admits the allegations contained in Paragraph III of plaintiff's complaint.

V.

Denies each and every allegation contained in Paragraph IV of plaintiff's complaint except admits that plaintiff is the owner of the building known as the Electric Building located at the Northeast corner of Broadway and Alder Streets and that on or about April 29th, 1922, plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure plaintiff to the extent of $7,500.00 [18] against damages and in addition against such expenses as might be incurred by plaintiff for such immediate surgical or medical relief at the time injury was sustained by such person or persons as were covered by said contract of insurance, and that Exhibit "A" attached to plaintiff's complaint is a substantial copy of said contract of insurance.

VI.

Denies each and every allegation contained in Paragraph V of plaintiff's complaint except admits that said contract of insurance has been at all times since April 29th, 1922, in full force and effect.

VII.

Denies each and every allegation contained in Paragraph VI of plaintiff's complaint except admits that the freight elevator upon which James A. Freeborough received certain injuries is one of the elevators included in Item 3 of the declara-

tions of said Exhibit "A" and is located in the Electric Building.

VIII.

Defendant has not sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in Paragraph VII of plaintiff's complaint and therefore denies the same.

IX.

Denies each and every allegation contained in Paragraph VIII of plaintiff's complaint and the whole thereof.

X.

Denies each and every allegation contained in Paragraph IX of plaintiff's complaint but admits that plaintiff notified defendant that one James A. Freeborough had sustained certain injuries and that the defendant refused to assume any responsibility under said contract of insurance and denied any and all [19] liability on account of or growing out of said accident.

XI.

Defendant has not sufficient knowledge or information upon which to form a belief as to the falsity of the allegations contained in Paragraph X of plaintiff's complaint and therefore denies the same.

XII.

Denies each and every allegation contained in Paragraph II of plaintiff's complaint except admits that on or about the 17th day of February, 1924, James A. Freeborough filed suit against the

plaintiff in the Circuit Court of the State of Oregon for Multnomah County for the recovery of damages growing out of injuries resulting to him which he alleged was the result of negligence of plaintiff in the construction and operation of said elevator.

XIII.

Denies each and every allegation contained in Paragraph XII of plaintiff's complaint except admits that plaintiff delivered a complaint and summons to defendant requesting it to defend said action.

XIV.

Admits each and every allegation contained in Paragraph XIII of plaintiff's complaint.

XV.

Denies each and every allegation contained in Paragraph XIV of plaintiff's complaint and the whole thereof.

XVI.

Denies each and every allegation contained in Paragraph XV of plaintiff's complaint and the whole thereof. [20]

XVII.

Denies each and every allegation contained in Paragraph XVI of plaintiff's complaint except admits that defendant at all times refused to satisfy any judgment or to reimburse plaintiff by reason of any matter set forth in its complaint.

XVIII.

Defendant has no knowledge or information sufficient to form a belief as to the truth of falsity of

the allegations contained in Paragraph XVII of plaintiff's complaint and therefore denies the same.

XIX.

Denies each and every allegation contained in Paragraph XVIII of plaintiff's complaint and the whole thereof.

Defendant for a further separate answer and defense to plaintiff's complaint admits, denies, and alleges as follows:

I.

That plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon and that it has changed its corporate name from that of Portland Railway Light & Power Co. to that of Portland Electric Power Company.

II.

That the defendant is a corporation duly organized and existing and duly authorized to do a general insurance business within the State of Oregon.

III.

That on or about April 24, 1922, plaintiff and defendant entered into a contract for insurance and by reason of said agreement, defendant issued to plaintiff one of its policies of insurance bearing number G. L. 27745. [21]

IV.

That said policy of insurance covered and protected the plaintiff against claims resulting from liability imposed upon plaintiff by law resulting from injury accidentally sustained by one person to the extent of $7,500.00 and the expenses incurred

by the plaintiff for such immediate medical and surgical relief as shall be imperative at the time any such injuries are sustained, provided, however, that said claim or expense was within the protection or provision of said policy.

V.

That that certain part of the Electric Building known as Electric Sub-Station was specifically excluded from protection by virtue of said policy by item 8 of said declarations.

VI.

That James A. Freeborough was employed by plaintiff to work in plaintiff's repair-shop which was operated at a place distant about one mile from the Electric Building and/or premises or places covered by said policy of insurance.

VII.

That said James A. Freeborough, in the course of his employment in said repair-shop went from said repair-shop to the Electric Sub-Station of the plaintiff in said Electric Building and was taking therefrom a piece of machinery from said Sub-station, which was to have been taken to plaintiff's repair-shop for repairs and that while transporting the same upon an elevator from said Electric Sub-Station and being one of the elevators referred to in Item 3 of the declarations, the said Freeborough received injuries to his right foot and as a result thereof, his right leg above the ankle was amputated. [22]

VIII.

That the coverage under said policy was based upon the premium paid.

IX.

That agreements 1, 2, 3, 4, 5, 6 and 7 of said policy of insurance were subject to conditions A to K, inclusive, as contained in said policy and the declarations or rider thereto.

X.

That condition "A," among other things, provides: "The premium for this policy is as expressed in Item 3 of the declarations except as this policy covers injuries and/or death to employees of the assured, in which case, as to the coverage, the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the assured in said business operations as expressed in Item 3 of the declarations."

XI.

That in Item 3 of declarations the estimated remuneration of employees was $6,000.00.

XII.

That the employees engaged in the character of work in which the said James A. Freeborough was employed and especially the remuneration or salary paid or contemplated to be paid to said James A. Freeborough, was not included or intended to be included in said estimated remuneration of $6,000.00 mentioned in Item 3 of declarations.

XIII.

That the only remuneration of employees esti-

mated in said Item 3 was the remuneration of those employees of plaintiff who were engaged in the maintenance, care and upkeep of the building mentioned in said policy. [23]

XIV.

That no premium was paid by plaintiff to defendant for the purpose of covering any employees of plaintiff other than those referred to and specified in Item 3, to wit: "Those engaged in the maintenance, care and upkeep of the building (Electric Building)" and that plaintiff paid to defendant for protection of these employees .05 per hundred based upon the estimated remuneration of said employees, to wit: $6,000.00

XV.

That James A. Freeborough was not an employee of plaintiff engaged in the maintenance, care and upkeep of said building, to wit: Electric Building and/or premises mentioned in said policy.

XVI.

That it was intended by and between plaintiff and defendant that the endorsement on the declarations attached to the policy reading "those engaged in the maintenance, care and upkeep of the building at .05 per hundred" and condition "A" of said policy confined the insurance above referred to to such employees and to exclude all others especially James A. Freeborough.

XVII.

That the premium charged for said policy was

composed of two items, to wit: One of which was with respect to the liability of the insured to all persons save employees and the other with respect to liability of the insured to its employees specifically referred to in said declaration and only such employees. [24]

XVIII.

That no premium was charged with respect to any employee of plaintiff save "those engaged in the maintenance, care and upkeep of the building" referred to in said policy and said last-mentioned employees were the only employees of plaintiff intended by the parties to be covered by said policy of insurance.

XIX.

That plaintiff did not agree to pay nor was plaintiff obligated to pay any premium with respect to the remuneration of any of its employees other than the ones referred to in said Item 3 of declarations.

Defendant for a second and further answer and defense to plaintiff's complaint admits, denies and alleges as follows:

I.

That plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon and that it has changed its corporate name from that of Portland Railway Light & Power Co. to that of Portland Electric Company.

II.

That the defendant is a corporation duly organized and existing and duly authorized to do a general insurance business within the State of Oregon.

III.

That on or about April 24, 1922, plaintiff and defendant entered into a contract for insurance and by reason of said agreement, defendant issued to plaintiff one of its policies of insurance bearing number G. L. 27745. [25]

IV.

That said policy of insurance covered and protected the plaintiff against claims resulting from liability imposed upon plaintiff by law resulting from injury accidentally sustained by one person mentioned in said policy to the extent of $7,500.00 and the expenses incurred by the plaintiff for such immediate medical and surgical relief as shall be imperative at the time any such injuries are sustained, provided, however, that a said claim or expense was within the protection or provisions of said policy.

V.

That that certain part of the Electric Building known as Electric Sub-station was specifically excluded from protection by virtue of said policy by Item 8 of said declarations.

VI.

That James A. Freeborough was employed by plaintiff to work in plaintiff's repair-shop which

was operated at a place distant about one mile from the Electric Building and/or premises or places covered by said policy of insurance.

VII.

That said James A. Freeborough, in the course of his employment in said repair-shop, went from said repair-shop to the Electric Sub-station of the plaintiff in said Electric Building and was taking therefrom a piece of machinery from said Sub-station, which was to have been taken to plaintiff's repair-shop for repairs and that while transporting the same upon an elevator from said Electric Sub-station and being one of the elevators referred to in Item 3 of the declarations, the said Freeborough received injuries to his right foot and as a result thereof, his right leg above the ankle was amputated. [26]

VIII.

That the coverage under said policy was based upon the premium paid.

IX.

That agreements 1, 2, 3, 4, 5, 6 and 7 of said policy of insurance were subject to conditions A to K, inclusive, as contained in said policy and the declarations or rider thereto.

X.

That condition "A," among other things, provides: "The premium for this policy is as expressed in Item 3 of the declarations except as this policy covers injuries and/or death to em-

ployees of the assured, in which case, as to the coverage, the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the assured in said business operations as expressed in Item 3 of the declarations."

XI.

That in Item 3 of declarations the estimated remuneration of the employees was $6,000.00.

XII.

That the employees engaged in the character of work in which the said James A. Freeborough was employed and especially the remuneration or salary paid or contemplated to be paid to said James A. Freeborough, was not included or intended to be included in said estimated remuneration of $6,000.00 mentioned in Item 3 of declarations.

XIII.

That the only remuneration of employees estimated in said Item 3 was the remuneration of those employees of plaintiff who were engaged in the maintenance, care and upkeep of the building mentioned in said policy. [27]

XIV.

That James A. Freeborough was not an employee of plaintiff engaged in the maintenance, care and upkeep of said building, to wit: Electric Building and/or premises mentioned in said policy.

XV.

That no premium was charged with respect to any employee of the plaintiff save those engaged in the maintenance, care and upkeep of the building referred to in said policy.

XVI.

That plaintiff did not agree to pay nor was plaintiff obligated to pay any premium with respect to the remuneration of any of its employees other than the ones referred to in Item 3 of the declarations.

XVII.

That by the terms of said policy the only employees of the plaintiff whose injuries or deaths were covered were those specified in said policy, to wit: Those engaged in the maintenance, care and upkeep of the building referred to in said policy. That by reason of the said coverage with respect to said employees whose estimated remuneration was the sum of $6,000.00 per annum, the plaintiff agreed to pay to defendant a premium at the rate of five cents per hundred dollars. That no premium was paid to defendant for coverage of injuries or death to any of plaintiff's other employees, all of whom were, including said Freeborough, as hereinabove set forth, excluded from the operation of said policy by the terms thereof.

Defendant for a third and further answer and defense to plaintiff's complaint, admits, denies and alleges as follows:

I.

That plaintiff is a corporation created and existing [28] under and by virtue of the laws of the State of Oregon and that it has changed its corporate name from that of Portland Railway Light & Power Co. to that of Portland Electric Company.

II.

That the defendant is a corporation duly organized and existing and duly authorized to do a general insurance business within the State of Oregon.

III.

That on or about April 24, 1922, plaintiff and defendant entered into a contract for insurance and by reason of said agreement, defendant issued to plaintiff one of its policies of insurance bearing number G. L. 27745.

IV.

That at all of the times mentioned in the complaint there was in full force and effect in the State of Oregon a Workmen's Compensation Act or Law which governed, prescribed and established the rights, duties and obligations of plaintiff and of the said Freeborough. That by the terms of the policy sued on it was stipulated and agreed by the parties thereto that said policy should not cover injuries to any employee of the plaintiff under any Workmen's Compensation Act or Law. That the said Freeborough, at the time of his alleged injury, was an employee of plaintiff under the said Workmen's Compensa-

tion Act or law of the State of Oregon. That by reason thereof injuries to him were not covered by the terms of said policy.

WHEREFORE this defendant prays that the plaintiff take nothing by the complaint herein and the defendant be given a judgment for costs and disbursements.

WILBUR, BECKETT & HOWELL,
Attorneys for Defendant. [29]

United States of America,
District of Oregon,
State of Oregon,
County of Multnomah,—ss.

I, James McI. Wood, being first duly sworn, say, I am the attorney-in-fact of the defendant in the above-entitled suit; that I have read the foregoing amended answer and know the contents thereof, and that the same is true of my own knowledge, except as to matters stated on information and belief, and as to such matters I believe the same to be true.

JAS. McI. WOOD.

Subscribed and sworn to before me this 1 day of December, 1924.

[Seal] F. C. HOWELL,
Notary Public for Oregon.

Com. exp. 11/4/28.

Filed December 2, 1924. [30]

AND AFTERWARDS, to wit, on the 17th day of December, 1924, there was duly filed in said court a motion to strike out parts of amended answer, in words and figures as follows, to wit: [31]

MOTION TO STRIKE OUT PARTS OF AMENDED ANSWER.

Comes now the plaintiff and moves the Court for an order herein, striking the second and further answer and defense of the defendant of defendant's amended answer, for the reason that the defendant has attempted to set up more than one separate and distinct defense thereto, to wit, the additional defense shown in paragraph XVIII thereof, which, by amendment, has been added to the original second and further answer herein.

And in case the Court should grant said motion, then the plaintiff further moves the Court for an order, requiring the defendant, upon repleading the subject matter of said paragraph XVIII of said second further and separate answer, to plead the facts with reference to the acceptance or rejection [32] by the plaintiff of the benefits of the Workmen's Compensation Act of the State of Oregon.

And, further, if the Court should refuse the motion of plaintiff first above stated, then the plaintiff further moves the Court for an order herein, striking from said paragraph XVIII of

said second amended answer, the allegation, to wit, "That the said Freeborough, at the time of his alleged injury, was an employee of plaintiff under the said Workmen's Compensation Act or Law of the State of Oregon," for the reason that said allegation is a conclusion of law and is not supported by any facts which can be truthfully pleaded, and said allegation is therefore sham and frivolous.

GRIFFITH, PECK & COKE.
GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

Filed December 17, 1924. [33]

AND AFTERWARDS, to wit, on Monday, the 29th day of December, 1924, the same being the 48th judicial day of the regular November term of said court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [34]

MINUTES OF COURT—DECEMBER 29, 1924—ORDER RE MOTION TO STRIKE OUT PARTS OF AMENDED ANSWER.

Now at this day this cause comes on to be heard by the Court on the motion to strike out parts of the amended answer on file herein, plaintiff appearing by Mr. Cassius M. Peck, of counsel, and

defendant by Mr. Ralph W. Wilbur and Mr. E. K. Oppenheimer, of counsel. And the Court having heard the arguments of counsel, and being advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby sustained as to the first paragraph, and that defendant be and he is hereby allowed to amend by interlineation the amended answer herein. [35]

AND AFTERWARDS, to wit, on the 13th day of January, 1925, there was duly filed in said court a demurrer and reply to answer, in words and figures as follows, to wit: [36]

DEMURRER AND REPLY TO ANSWER.

Comes now the plaintiff and demurs to the first further and separate answer and defense and to the second further and separate answer and defense, each as set forth in defendant's answer herein, for the reason:

That the said further and separate answers and defenses, and each of them, fail to state facts sufficient to constitute a defense herein.

Replying to the third further and separate answer and defense, as set forth in defendant's answer, the plaintiff admits, denies and alleges:

I.

Admits the allegations of paragraphs I, II, and III thereof. [37]

II.

Replying to paragraph IV thereof, plaintiff admits that at all times mentioned in the complaint, there was in full force and effect in the State of Oregon a Workmen's Compensation Act or law; that by the terms of the policy herein sued upon, to wit, Exhibit "A" attached to the complaint, it is provided that said policy shall not cover injuries or death to any employee of the assured under any Workmen's Compensation Act or law. Denies that the said Freeborough, at the time of his alleged injury, was an employee of the plaintiff under the said Workmen's Compensation Act or law of the State of Oregon, for the reason that the plaintiff, under its former name of Portland Railway, Light and Power Company, did, on November 14, 1913, elect not to contribute to the Industrial Accident Fund created by said act and not to come within the purview of said act, all as shown by the following notice, which was given by the plaintiff, under its former name of Portland Railway, Light and Power Company, to the Industrial Accident Commission and which said notice has, at all times since the date thereof, continued in full force and effect:

"Portland, Oregon, November 14th, 1913.

To the State Industrial Accident Commission of the State of Oregon, Salem, Oregon.

Notice is hereby given you that the undersigned, a corporation organized under the laws of the State of Oregon, and qualified to transact business within the State of Oregon, and [38] being engaged in a business or occupation comprehended within the

scope and meaning of Chapter 112 of General Laws of Oregon for the year 1913, and filed in the office of the Secretary of State, February 25th, 1913, and approved by the people of the State of Oregon under the referendum on November 4th, 1913, elects not to contribute to the Industrial Accident Fund created by said act, and not to come within the purview of said act, but the undersigned hereby notifies you that it will not be obligated by said act or any provisions or provisions thereof.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY,

[Corporate Seal] By F. I. FULLER,
Vice-President.

Attest: C. N. HUGGINS,
Assistant Secretary."

The said Freeborough on his part has never served any notice, or otherwise made any election to contribute to the Industrial Accident Fund created by said act, or to come within the purview of said act.

III.

Denies each and every other allegation contained in said third further and separate answer and defense, except as may have been hereinbefore expressly admitted, stated or qualified.

WHEREFORE, this plaintiff demands judgment as in its complaint prayed for.

GRIFFITH, PECK & COKE.
GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, C. R. Peck, one of attorneys for plaintiff in the within entitled suit, do hereby certify that the foregoing demurrer is in my opinion well founded in law.

C. R. PECK.

Filed January 13, 1925. [39]

AND AFTERWARDS, to wit, on the 14th day of January, 1925, there was duly filed in said court a demurrer to reply, in words and figures as follows, to wit: [40]

DEMURRER TO REPLY.

Comes now the defendant and demurs to plaintiff's reply to defendant's third further separate answer and defense for the reason:

I.

That said reply fails to set forth facts sufficient to constitute a reply to defendant's third further separate answer and defense.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant.

I, R. W. Wilbur, one of the attorneys for the defendant in the within entitled action, do hereby certify that the foregoing demurrer is in my opinion well founded in law.

R. W. WILBUR.

United States of America,
District of Oregon,—ss.

Due and timely service of the within demurrer and the receipt of a duly certified copy thereof, all at the city of Portland in the District of Oregon, is hereby admitted.

GRIFFITH, PECK & COKE,
M. C. C.,
Attorneys for Plaintiff.

Filed January 14, 1925. [41]

AND AFTERWARDS, to wit, on Monday, the 9th day of February, 1925, the same being the 83d judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [42]

MINUTES OF COURT—FEBRUARY 9, 1925—ORDER OVERRULING DEMURRER TO REPLY.

This cause was heard by the Court on the demurrer to the reply herein, and was argued by Mr. Cassius M. Peck, of counsel for plaintiff, and Mr. E. K. Oppenheimer, of counsel for defendant. Upon consideration whereof,—

IT IS ORDERED that said demurrer be and the same is hereby overruled. [43]

AND AFTERWARDS, to wit, on the 9th day of February, 1925, there was duly filed in said court an opinion, in words and figures as follows, to wit: [44]

OPINION.

February 9, 1925.

GRIFFITH, PECK & COKE, for Plaintiff.

WILBUR, BECKETT & HOWELL and E. K. OPPENHEIMER, for Defendant.

WOLVERTON, District Judge.—This case is here for the second time for interpretation of the policy upon which the action is based. It is now insisted by defendant, in support of its demurrer to plaintiff's reply, that, because of the following clause found in the policy, namely, "This policy shall not cover injuries or death * * * to any employee of the assured under any Workmen's Compensation Act or Law," it does not cover under the conditions present.

It is admitted that the Workmen's Compensation Act was rejected by plaintiff, and the reply declares that the employee Freeborough did not elect to come under its provisions.

The act, as I read it, so far as applicable, places employers primarily under its provisions, but they may escape its operation by rejecting the same in manner prescribed. The employees are not primar-

ily within its purview; nor does it affect them unless they elect to avail themselves of its provisions. When the [45] employer rejects the act and the employee does not elect to avail himself of its provisions, neither is henceforth under the act. So that the clause relied upon for relief from liability on the part of the defendant does not operate here as an exception to liability under the policy. The demurrer to the reply will therefore be overruled.

In view of the former opinion plaintiff's demurrer to the first and second further and separate answer and defense set up by the amended answer will be sustained.

Filed February 9, 1925. [46]

AND AFTERWARDS, to wit, on the 23d day of October, 1925, there was duly filed in said court a stipulation waiving jury, in words and figures as follows, to wit: [47]

STIPULATION WAIVING JURY TRIAL.

It is hereby stipulated between the parties hereto and their respective attorneys in open court that this law action may be tried before the Judge of the above-entitled court without a jury, and a jury is hereby waived.

Dated Oct. 23, 1925.

WILBUR, BECKETT & HOWELL & OPPENHEIMER,
Attorneys for Defendant.

GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

Filed October 23, 1925. [48]

AND AFTERWARDS, to wit, on Friday, the 23d day of October, 1925, the same being the 95th judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [49]

MINUTES OF COURT—OCTOBER 23, 1925—ORDER DIRECTING TRIAL OF CAUSE WITHOUT JURY.

Based upon the stipulation herein filed by the respective parties and their attorneys,—

IT IS HEREBY ORDERED that this said law action be tried by the Judge of the above-entitled court without a jury and that the jury is hereby waived.

CHAS. E. WOLVERTON,
Judge.

Dated October 23, 1925.
Filed October 23, 1925. [50]

AND AFTERWARDS, to wit, on the 1st day of March, 1926, there was duly filed in said court an opinion, in words and figures as follows, to wit: [51]

OPINION.

March 1, 1926.

GRIFFITHS, PECK & COKE, for Plaintiff.

WILBUR, BECKETT, HOWELL & OPPENHEIMER, for Defendant.

WOLVERTON, District Judge.—After careful examination of the evidence and stipulations of counsel, and of their arguments and briefs, I am persuaded that the legal questions involved have heretofore been practically disposed of, and that the evidence serves to substantiate the plaintiff's cause of action.

Plaintiff has proffered its findings of fact and law, to which certain objections have been interposed. The objections will be denied, and the findings of fact and law, with the addition of two paragraphs, are approved and allowed. So will the judgment tendered be approved and signed. [52]

AND AFTERWARDS, to wit, on the 1st day of March, 1926, there was duly filed in said court findings of fact and conclusions of law, in words and figures as follows, to wit: [53]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

NOW after the hearing herein, wherein the parties appeared by their respective attorneys of record, testimony was introduced and arguments of counsel heard and delivered, and being fully advised in the premises, the Court makes the following

FINDINGS OF FACT.

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland, Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, and existing under the laws of Great Britain is a subject of Great [54] Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action ex-

ceeds Three Thousand Dollars ($3,000.00), exclusive of costs and interest.

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance, attached to the complaint as Exhibit "A" whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred ($7,500.00) Dollars against damages resulting from bodily injuries accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained.

V.

That said contract, except for the breaches of the defendant as hereinafter alleged, is now and has been at all times since April 29, 1922, in full force and effect and this plaintiff has complied with each and every condition thereof by it undertaken. [55]

VI.

That the freight elevator located in said Electric Building, and whereon and in connection with which bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item III of the declarations of said Exhibit "A."

VII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floor of said elevator and the side walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit "A" under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit "A," to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent of $7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom. [56]

IX.

That immediately upon the happening of said accident, the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant re-

fused so to do and denied any and all liability on account of or growing out of said accident.

X.

That upon the happening of said accident the plaintiff incurred ambulance and hospital expenses for the imperative, immediate, medical and surgical relief of the said James A. Freeborough, in the aggregate sum of One Hundred Sixty-nine Dollars and Seventy-five cents ($169.75); that it was imperative that surgical and medical service should be rendered to the plaintiff and such medical and surgical services, of the reasonable value of Two Hundred and Fifty Dollars ($250.00) were rendered, by the chief surgeon of the plaintiff to the said James A. Freeborough, that the said chief surgeon of the plaintiff was employed by the plaintiff at an annual salary or retainer, to render surgical and medical aid to the employees of the plaintiff and under said contract and annual retainer the said medical and surgical services were rendered to the said James A. Freeborough without additional cost to the plaintiff.

XI.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his [57] said injuries, resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19, 1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XII.

That immediately thereafter, on February 19, 1924, this plaintiff delivered said complaint and summons to the defendant and requested it to defend said suit in accordance with the terms and provisions of said Exhibit "A."

XIII.

That thereafter, on February 23, 1924, this defendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIV.

That the allegations of said complaint charging the negligence of this plaintiff as the proximate cause of his injuries were true, and the sum of $8,000.00 was a fair and reasonable compensation for the injuries and damages resulting to said James A. Freeborough from and on account of said accident.

XV.

That thereafter, acting in the best interest of both the plaintiff and defendant herein, this plaintiff as defendant in said suit, filed in said court and cause its confession, whereby it confessed judgment in the sum of $8,000.00 and thereafter on June ——, 1924, a judgment [58] in the sum of $8,000.00 was duly entered in said cause in favor of said James A. Freeborough and against this plaintiff as defendant therein.

XVI.

That immediately thereafter this plaintiff demanded of the defendant that it satisfy said judg-

ment to the extent of $7,500.00 and that it reimburse this plaintiff for said expense of $500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its denial of any and all liability arising or growing out of said accident.

XVII.

That upon the refusal of the defendant to settle and satisfy said judgment to the extent of $7,500.00 this plaintiff did on July 10th, 1924, in the necessary protection of its property from sale upon execution settle and pay said judgment by the payment to the said James A. Freeborough of $7,500.00 in cash and by the delivery to him of an order for future surgical and medical service by the surgical and medical staff of this plaintiff.

XVIII.

That in so denying liability under said Exhibit "A" and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of $7,500.00, as provided by said Exhibit "A," and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of $7,500.00, as provided in said Exhibit "A," and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen

Dollars and Seventy-five Cents ($419.75), this defendant has breached its said contract of Insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of [59] surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), or any part thereof.

XIX.

That Freeborough was not at the time of injury an employee of plaintiff or otherwise under or subject to the Workmen's Compensation Act or Law of the State of Oregon.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit "A," under Agreement IV thereof and was not a person excluded by the terms of agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit "A," to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and to pay the expense incurred

by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, to wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident [60] alleged in the complaint and covered by the said policy of insurance.

II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of said James A. Freeborough, to wit, in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars ($7,500.00), violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75).

III.

That the plaintiff should recover judgment of and from the defendant in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-

five Cents ($7,919.75), together with its costs and disbursements herein.

CHAS. E. WOLVERTON,
Judge.

Filed March 1, 1926. [61]

AND AFTERWARDS, to wit, on Monday, the 1st day of March, 1926, the same being the 1st judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause to wit: [62]

[Title of Court and Cause.]

JUDGMENT ORDER.

Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), together with its costs and disbursements hereinafter to be taxed.

CHARLES E. WOLVERTON,
Judge.

Filed March 1, 1926. [63]

AND AFTERWARDS, to wit, on the 2d day of April, 1926, there was duly filed in said court, a cost bill, in words and figures as follows, to wit: [64]

COST BILL.

The following is a statement of disbursements claimed by the plaintiff in the above-entitled cause:

Clerk's fees, taxed at	$ 8.10
Prevailing fee	20.00
M. A. Fleming, reporting testimony	5.00
Witness Fees:	
James A. Freeborough—one day—2 miles	2.10
Total	$35.20

Taxed April 3, 1926.

G. H. MARSH,
Clerk.
By H. S. Kenyon,
Deputy.

State of Oregon,
County of Multnomah,—ss.

I, Cassius R. Peck, being first duly sworn, say: That I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that plaintiff is entitled to recover the same.

CASSIUS R. PECK.

Subscribed and sworn to before me this 1st day of April, 1926.

[Seal] EARL S. NELSON,
Notary Public for Oregon.

My commission expires Nov. 7, 1928.

Filed April 2, 1926. [65]

AND AFTERWARDS, to wit, on the 6th day of April, 1926, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [66]

PETITION FOR WRIT OF ERROR.

To the Honorable CHARLES E. WOLVERTON, Judge of the Above-entitled Court:

Now, comes the defendant, The Employers' Liability Assurance Corporation Limited of London, England, and respectfully shows that on the first day of March, 1926, a judgment was rendered against your petitioner and in favor of the plaintiff above named in the sum of Seven Thousand Nine Hundred and 75/100 Dollars ($7,919.75) and for costs and disbursements in favor of the plaintiff and against the defendant taxed at the sum of $35.20 *Dollars.*

Your petitioner feeling itself aggrieved by the judgment order entered upon findings of fact and conclusions of law entered herein, herewith petitions this Court for an order allowing the defendant to prosecute a writ of error to the United States Circuit

Court of Appeals for the Ninth Circuit from the District Court of the United States for the District of Oregon, under and according to the laws of the United States in such cases made and provided and within the time allowed by law and also for an order that a transcript of the record and proceedings and all papers [67] upon which said judgment and rulings therein were rendered be duly authenticated as by law provided and sent to the United States Circuit Court of Appeals for the Ninth Circuit as aforesaid and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error and that upon giving the said security or fund that proceedings in this case be suspended and stayed until the determination of said writ of error.

And your petitioner will ever pray.

That there is filed herewith in this court assignments of error relied upon by the said defendant.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,

Attorneys for Petitioner.

State of Oregon,
County of Multnomah,—ss.

I, James McI. Wood, being first duly sworn, depose and say that I am the attorney in fact for the State of Oregon for the defendant petitioner and that the foregoing facts are true as I verily believe.

JAMES McI. WOOD.

Subscribed and sworn to before me this 30 day of March, 1926.

[Seal] R. W. WILBUR,
Notary Public for Oregon.

My commission expires 9/27/28.

Filed April 6, 1926. [68]

AND AFTERWARDS, to wit, on the 6th day of April, 1926, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [69]

ASSIGNMENTS OF ERROR.

Now comes the defendant, The Employers' Liability Assurance Corporation Limited of London, England, and files with its petition for writ of error herein the following assignments of error upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

That the Court erred in sustaining the motion of the plaintiff to strike parts of the amended answer of the defendants, to wit: Paragraph eighteen of the said amended answer as shown on page eleven thereof, marked paragraph seventeen as amended, for the reason that the same stated a good defense to the complaint of the plaintiff.

II.

That the Court erred in the overruling of the demurrer filed by the defendant to the plaintiff's reply made to the defendant's third, further and

separate answer and defense, which demurrer was for the reason that the said reply failed to set forth facts sufficient to constitute a reply to the defendant's third, further and separate answer. [70]

The plaintiff and defendant each submitted to the Court findings of fact, conclusions of law and judgment order, and each filed exceptions and objections to the findings of fact, conclusions of law and judgment order presented by the other party, and that the Court finally signed findings of fact and conclusions of law, and caused to be entered a judgment order as set forth herein in this transcript (bill of exceptions, page 14), and this defendant assigns the following errors:

III.

That the Court erred in making the following finding of fact, which is Number VIII in the findings of fact finally found by the Court:

"VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit 'A' under Agreement IV thereof and was not a person excluded by the terms of agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit 'A,' to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expenses incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent

of $7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom";

for the reason that the same was not justified by the evidence or admissions produced at the trial.

IV.

That the Court committed error in making the finding of fact as set forth in Paragraph XVIII, as follows:

"XVIII.

That in so denying liability under said Exhibit 'A' and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of $7,500.00, as provided by said Exhibit 'A,' and in refusing to defend said suit and in refusing [71] to pay and satisfy said judgment to the extent of $7,500.00, as provided in said Exhibit 'A,' and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen Dollars and Seventy-five Cents ($419.75), this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said ex-

pense of surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), or any part thereof."

in that the evidence introduced in this action and the law applicable thereto did not justify the said finding.

V.

That the Court committed an error in making the finding of fact as set forth in Paragraph XIX, as follows:

"XIX.

That Freeborough was not at the time of injury an employee of plaintiff, or otherwise under or subject to the Workmen's Compensation Act or Law of the State of Oregon."

for the reason that the same was not justified by the law nor by any evidence introduced at this trial.

VI.

That the Court erred in making conclusions of law as follows, to wit, in Conclusion of Law No. 1:

"1. That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit 'A,' under Agreement IV thereof and was not

a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit 'A,' to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. [72] Freeborough, to wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident alleged in the complaint and covered by the said policy of insurance,"

for the reason that the said conclusion of law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VII.

That the Court erred in making conclusions of law as follows, to wit, in Conclusion of Law No. 2:

"II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the im-

perative, immediate, medical and surgical relief of said James A. Freeborough, to wit, in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars ($7,500.00), violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($17,919.75),"

for the reason that the said conclusion of law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VIII.

That the Court erred in making conclusion of law as follows, to wit, in Conclusion of Law No. 3:

"III.

That the plaintiff should recover judgment of and from the defendant in the sum of SEVEN THOUSAND NINE HUNDRED AND NINETEEN DOLLARS AND SEVENTY-FIVE CENTS ($7,919.75) together with its costs and disbursements herein," [73]

for the reason that the said conclusion of law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

IX.

That the Court erred in giving a judgment or-

der in favor of the said plaintiff, which was in words and figures as follows:

> "Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75) together with its costs and disbursements hereinafter to be taxed."

WHEREFORE this defendant prays that the judgment of the District Court of the United States, for the District of Oregon, may be reversed.

WILBER, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant.

Filed April 6, 1926. [74]

AND AFTERWARDS, to wit, on Tuesday, the 6th day of April, 1926, the same being the 32d judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [75]

MINUTES OF COURT—APRIL 6, 1926—ORDER ALLOWING WRIT OF ERROR.

On this 5th day of April, 1926, came the defendant, The Employers Liability Assurance Corporation Limited of London, England, a corporation,

by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error and the assignments of error to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does hereby allow the writ of error upon said defendant giving bond according to law in the sum of Eighty-five Hundred Dollars, which shall operate as a supersedeas bond.

CHAS. E. WOLVERTON,
District Judge.

Dated April 6th, 1926.
Filed April 6, 1926. [76]

AND AFTERWARDS, to wit, on the 6th day of April, 1926, there was duly filed in said court, a bond on writ of error, in words and figures as follows, to wit: [77]

APPEAL BOND ON WRIT OF ERROR AND SUPERSEDEAS.

KNOW ALL MEN BY THESE PRESENTS, That we, The Employers Liability Assurance Corporation Limited of London, England, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are firmly

bound unto the above-named plaintiff in the sum of $8,500.00 Dollars to be paid to the said plaintiff for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of April, in the year of our Lord one thousand nine hundred and twenty-six.

WHEREAS, lately, at a regular term of the District Court of the United States for the District of Oregon, in a suit pending in said court between said Portland Electric Power Company, a corporation, and The Employers Liability Assurance Corporation Limited of London, England, a corporation, defendant, a judgment was rendered against the said defendant in the sum of Seven Thousand Nine Hundred Nineteen and 75/100 Dollars ($7,919.75), plus costs amounting to and taxed in the sum of $35.20 *Dollars* [78] and said defendant having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment of the said Court in the aforesaid suit and a citation directed to the said Portland Electric Power Company, a corporation, citing it to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in San Francisco and State of California, according to law, within thirty days from the date thereof,—

NOW, THEREFORE, THE CONDITION of the above obligation is such that if the Employers

Liability Assurance Corporation Limited of London, England, shall prosecute its writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said principal, The Employers Liablity Assurance Corporation Limited of London, England, and American Surety Company of New York, as surety, have caused their corporate names and seals to be hereunto signed and affixed this 6th day of April, 1926.

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND,

By JAMES McI. WOOD,
Its Attorney-in-Fact.

AMERICAN SURETY COMPANY OF NEW YORK,

[Seal American Surety Company]

By W. A. KING,
Resident Vice-President.

By H. DeFRANCQ,
Resident Asst. Secretary.

By W. A. KING,
Resident Agent.

The foregoing bond is hereby approved by me this 6th day of April, 1926.

CHAS. E. WOLVERTON,
District Judge for the United States for the District of Oregon.

Filed April 6, 1926. [79]

AND AFTERWARDS, to wit, on the 8th day of April, 1926, there was duly filed in said court a stipulation for hearing on writ of error during the October term of the court of appeals, in words and figures as follows, to wit: [80]

STIPULATION RE HEARING ON WRIT OF ERROR AT OCTOBER SESSION OF COURT OF APPEALS.

IT IS HEREBY STIPULATED between the parties hereto that this case may be docketed and tried in San Francisco, California, during the October Term of 1926.

GRIFFITH, PECK & COKE,
By CASSIUS R. PECK,
Attorneys for Plaintiff.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant.

Filed April 8, 1926. [81]

AND AFTERWARDS, to wit, on the 12th day of April, 1926, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [82]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please include in the record for the Circuit Court of Appeals for the Ninth Circuit in the proceed-

ings in error in the above-entitled cause the following, to wit:

1. Complaint.
2. Amended answer.
3. Motion to strike second and further defendant's answer.
4. Order of December 29th, 1924, sustaining the said motion.
5. Demurrer and reply.
6. Demurrer of defendant to plaintiff's reply to defendant's third further and separate answer.
7. Order overruling demurrer to reply.
8. Stipulation waiving jury.
9. Order to try case without a jury.
10. Judgment order.
11. Cost bill.
12. Amended bill of exceptions.
13. Petition for writ of error.
14. Assignments of error. [83]
15. Order allowing writ of error.
16. Appeal bond on writ of error and supersedeas.
17. Writ of error.
18. Citation.
19. Stipulation to try case in San Francisco during the October Term of 1926 and to have case docketed for October Term of 1926.
20. All opinions by trial court.
21. All orders extending time for bill of exceptions.
22. All orders for extending time for docketing action in the Court of Appeals.

23. This praecipe.
24. Clerk's return to writ.
25. Clerk's certificate.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant Appellant.

IT IS HEREBY STIPULATED AND AGREED between the parties in the above-entitled action through their respective counsel that the foregoing praecipe contains a request for all portions of the record in any way material to the consideration of said cause in the United States Circuit Court of Appeals for the Ninth District in reviewing the same.

GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant.

Filed April 12, 1926. [84]

AND AFTERWARDS, to wit, on the 12th day of April, 1926, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit: [85]

AMENDED BILL OF EXCEPTIONS.

BE IT REMEMBERED, That heretofore, to wit, on the 23d day of October, 1925, at Portland, Oregon, in the District Court of the United States for the District of Oregon, the above-entitled cause

came on for trial and was heard before the Honorable Chas. E. Wolverton, Judge of the above-entitled court, presiding, the plaintiff appearing by Cassius Peck and the defendant appearing by R. W. Wilbur.

It was stipulated between the parties that a jury would be waived and that the case might be tried before the Court, and an order was entered upon said stipulation.

Thereupon the plaintiff produced evidence as follows:

That the plaintiff is a corporation organized under the laws of the State of Oregon, and that since the execution of the contract pleaded in the complaint it had changed its name from Portland Railway, Light & Power Company to that of Portland Electric Power Company; that the defendant is a corporation chartered, organized and existing under the laws of Great Britain and subject to the laws thereof, and is a citizen [86] doing business within the State of Oregon and has complied with the laws of the State of Oregon relative to foreign corporations. That the amount in controversy in this action exceeds the sum of three thousand dollars, exclusive of interest and costs. That the plaintiff is the owner of a building in Portland known as the Electric Building, located at the northeast corner of Broadway and Alder Streets, and that on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure the plaintiff to the extent of seventy-five hundred dollars against

damages, in accordance with a certain contract of insurance or insurance policy, a copy of which is attached to the said complaint herein and marked Exhibit "A," which insurance contract and policy was in force at all times from April 29, 1922, up to and including the time of the injury to one James A. Freeborough as alleged in the complaint.

That there was a freight elevator located in said Electric Building upon which the said James A. Freeborough was injured on the 4th day of April, 1923, and while the said Freeborough was riding upon said elevator, at which time his right foot was crushed between the floor of said elevator and the side walls of the elevator shaft, and that it was necessary to amputate said Freeborough's right leg above the ankle. That upon the happening of said accident the said plaintiff notified the defendant and requested the defendant to investigate and settle for the claims resulting from said accident, in accordance with the provisions of the insurance policy as set forth in said Exhibit "A" attached to the complaint, but that the defendant refused to so do and denied any and all liability growing out of the said accident. [87]

That upon the happening of said accident to Freeborough the plaintiff immediately called an ambulance and took the said Freeborough to the St. Vincent's Hospital at Portland, Oregon, where the injured was given medical and surgical treatment, and the leg of the said Freeborough was amputated above the ankle; that the ambulance and hospital expenses incurred by the said plaintiff in

said medical and surgical relief to the said Freeborough were in the sum of $169.75, and that the surgeon who performed the said work was the surgeon of the plaintiff and in the employ of the plaintiff upon an annual retainer to administer surgical and medical relief to the employees of the plaintiff; but that the said plaintiff did not pay the said surgeon any additional sum for surgical and medical relief administered to the said Freeborough, but the said surgical and medical relief was administered by said surgeon in performance of his annual retainer contract with the plaintiff, but that the reasonable value of said services so rendered by said surgeon to said Freeborough was the sum of $250.00.

That thereafter, and on February 17, 1924, the said Freeborough filed a suit against this plaintiff in the Circuit Court of the State of Oregon for the County of Multnomah for the recovery of damages growing out of his said injury as the proximate result of the negligence of the plaintiff in the construction and operation of said elevator, and that thereafter, on February 19, 1924, said complaint, together with a summons, was regularly served upon this plaintiff, and that thereafter, on Februaury 19, 1924, the plaintiff delivered said complaint and summons to the defendant and requested the defendant to defend said suit in accordance with the terms and provisions of said insurance contract, and that thereafter, on February [88] 23, 1924, the defendant returned said complaint and summons to the defendant and denied any liability growing

out of said accident. That thereafter a judgment was entered against this plaintiff in favor of the said Freeborough for the sum of eight thousand dollars, said judgment having been confessed by this plaintiff, and said judgment was duly entered in the records of said Court.

That immediately thereafter this plaintiff demanded that this said defendant pay the said judgment to the extent of seven thousand five hundred dollars and reimburse the plaintiff for the expense of five hundred dollars incurred by it for imperative surgical relief to the said Freeborough, but that the defendant refused to so satisfy the said judgment or to reimburse this plaintiff, and reiterated its denial of any liability arising or growing out of said contract. That upon the refusal of this defendant to settle and satisfy said judgment to the extent of seventy-five hundred dollars this plaintiff did, on July 10, 1924, in the necessary protection of its property from sale upon execution, settle and pay such judgment by payment to the said Freeborough of seventy-five hundred dollars in cash and by delivering to him an order for future surgical and medical services by the surgical and medical staff of the plaintiff.

There was then offered in evidence in this case a certain exhibit marked Plaintiff's Exhibit No. 1, as follows: [89]

PLAINTIFF'S EXHIBIT No. 1.

(Title of Court and Cause.)

"IT IS HEREBY STIPULATED AND AGREED, by and between the parties thereto as follows:

I.

That the facts alleged in paragraphs I, II, III, IV, V, VI, IX, XI, XII, XIII, XVI and XVII of the complaint herein, are true, except as to paragraph five (5) defendant specifically denies any breach or breaches of said contract of insurance.

II.

With reference to the allegations of Paragraph X of said complaint, it is stipulated that upon the happening of said accident to the said Freeborough, the plaintiff immediately called an ambulance and took the said Freeborough to St. Vincent's Hospital, in the City of Portland, Oregon, where the surgeon of the plaintiff administered such medical and surgical relief, including the amputation of the limb of the said Freeborough, as the condition of said Freeborough immediately demanded; that the ambulance and hospital expense incurred and paid by the plaintiff in said medical and surgical relief to the said Freeborough, was in the aggregate sum of One Hundred Sixty-nine Dollars and Seventy-five Cents ($169.75); that the surgeon of the plaintiff is employed by the plaintiff on an annual retainer, to administer surgical and medical relief to the employees of the plaintiff, and the plaintiff

did not pay said surgeon any additional sum for surgical and medical relief administered to said Freeborough, but the said surgical and medical relief was administered to the said Freeborough by said surgeon in the performance of this annual retainer contract with the plaintiff; that the reasonable value of the services rendered to the said Freeborough by said chief surgeon of the plaintiff, was in the aggregate sum of Two Hundred and Fifty ($250.00) Dollars.

III.

That the plaintiff, before commencing its action herein, demanded payment of the defendant in the amount demanded in the complaint, and the defendant refused to pay said amount, or any part thereof.

IV.

That the said Freeborough was employed by the plaintiff at the time of the accident and his principal place of employment was in a machine-shop of the plaintiff; located at some distance from the said Electric Building, in which machine-shop power driven machinery was used; that the said Freeborough was not engaged in the maintenance, care and upkeep of the said Electric Building nor was the salary of the said Freeborough included in the estimated remuneration of the employees, [90] of $6,000.00, referred to in Item Three of the Declarations attached to the Contract of Insurance, attached to and made a part of the complaint.

V.

That this stipulation may be introduced in evi-

dence by either party upon the trial of this cause and shall be proof of each and every fact herein stipulated.

Dated at Portland, Oregon, this 20th day of October, 1925.

GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.
WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant.
By R. W. WILBUR."

Thereupon JAMES ARTHUR FREEBOROUGH was produced as a witness for the said plaintiff, and testified as follows:

TESTIMONY OF JAMES ARTHUR FREEBOROUGH, FOR PLAINTIFF.

My name is James Arthur Freeborough, thirty-seven years of age, and my training is along mechanical lines, with machine work, electric work, designing and drafting and I have followed that occupation since I was sixteen. That at the times of this accident I was employed by the Portland Electric Power Company in the capacity of electrical machinist and made mechanical repairs to the machinery of the plaintiff whenever I was called in the City of Portland, subject to the direction of my superiors. That my headquarters were at the Hawthorne Building, at East Water and Hawthorne Avenue, which is the shop where I worked, but on the day of my accident I went to the Electric Building, in Portland, Oregon. I was

(Testimony of James Arthur Freeborough.)

sent there to repair an air-compressor which is used in the service of the building, to take out the electric motor and repair a burned bearing, and was to take the damaged parts over to the Hawthorne Building and repair them. We had loaded these parts [91] on the elevator, that is the parts that had been damaged, and the elevator was a small cage with little room for the parts; and one of the parts I thought was a little close to the edge and I reached over to remove it. It looked as though it was just on a balance and I moved it to make it more secure and stepped back slightly and my foot came over the edge of the elevator just at the time it was coming up to an I beam supporting the first floor. I must have stepped back with my foot so that the heel projected over the edge of the elevator slightly. There was only about an inch of space between the I beam and the edge of the platform and that caught my heel and twisted it back. Two sides of the elevator were entirely open, or unenclosed, and there was nothing whatever to prevent the elevator being entirely enclosed, and if the elevator had been enclosed it would have been impossible for me to have been hurt. After the accident they sent for the ambulance and carried me to the hospital, operated I think about an hour after the accident, which operation consisted of the amputation of my leg a few inches below the knee to remove the portions of my leg that were mangled. They made a second amputation at the same time to be more sure that there was nothing further that

(Testimony of James Arthur Freeborough.)

was bruised or any more mangled parts. I was at the hospital about a month and had a special nurse. Dr. Sommer performed the operation and there was an assistant. Dr. Sommer is the Chief Surgeon of the Portland Power Company, plaintiff, and all of the medical and surgical assistance was rendered from his office, with one slight exception.

That subsequently I filed a suit against the Portland Electric Power Company.

A copy of said complaint was shown to the said witness and identified by him as the complaint that he filed [92] against this plaintiff, which generally charged this plaintiff with negligence in the operation and maintenance of its said elevator and that on account of the negligence of this plaintiff, without the negligence of the said Freeborough, the said Freeborough received the injury complained of.

Said witness further testified: I was receiving wages at the time of the accident of approximately $200.00 a month and had been earning that sum for a long time and had been in the employ of this plaintiff for about one year. That I have taken an engineering course in Boston and a home course of study for about three years, and have attended Y. M. C. A. night schools and have had about fifteen years practical experience. That I demanded in my suit damages to the extent of twenty-five thousand dollars, and I would not accept forty-five hundred dollars offered by the claim agent of this plaintiff and therefore brought suit. That there was no collusion or agreement of any kind between the offi-

cers of this plaintiff and myself with reference to the settlement of the suit, but that I would not be willing at any time to accept a sum less than eight thousand dollars for my injury. My attorney desired to settle for a little less money, but I would not settle for less than the said eight thousand dollars. That there had been paid upon said judgment only the sum of seventy-five hundred dollars, and that there was given a written statement by this plaintiff to me that I could have medical service as long as it was necessary, without charge, by the Chief Surgeon of this plaintiff. That the Chief Surgeon of this plaintiff gave me a written order for a mechanical foot and things of that kind so long as it might be necessary, and that they paid one hundred and fifty dollars for an artificial limb. That [93] there was given an order for five hundred dollars, together with the seventy-five hundred dollars, to make up the full amount of the eight thousand dollar judgment, the five hundred dollars being the agreed value of the service to be performed by this plaintiff.

I never served any notice upon the State Industrial Accident Commission of Oregon of my desire to come under the Workmen's Compensation Law of the State of Oregon, and have never held any communication with anyone about the Workmen's Compensation Law of the State of Oregon, nor made any effort to come under the said Act.

Cross-examination.

My headquarters were at the machine-shop on the east side of the river, in Portland, Oregon, at

East Water and Hawthorne Avenue, and I worked there as machinist and repair work and the greater portion of my time was spent at said place, and in the said building there was considerable power driven machinery, consisting of lathes and usual machine-shop equipment and electrical appliances. That the accident happened in the Electric Building, in Portland, Oregon, which was on the other side of the Willamette River from the place where I generally worked, but this said plaintiff owned both said buildings. That in the settlement of the said judgment which was confessed against this plaintiff and in favor of me there was paid to my attorney the sum of seventy-five hundred dollars, but the balance of five hundred dollars was not paid in cash, but it was understood and agreed that if I required any future medical service this was to be given to me by this plaintiff without charge, and that this was the basis [94] or substance of the agreement between the parties.

It was stated that Freeborough was not engaged in the maintenance, upkeep or care of the Electric Building, and that the salary of the said Freeborough was not in any sense included within the Six Thousand Dollar compensation specified in the policy of insurance, but that, generally speaking, Freeborough worked on the other side of the river from the Electric Building and did the repair work all over the city.

Redirect Examination.

The Electric Building had nine floors, and all of the floors in said Electric Building were occupied

(Testimony of James Arthur Freeborough.)
by the Portland Electric Power Company except one; that is the seventh floor, occupied by the General Electric Company, and that this plaintiff had employees about the City, outside of those engaged in the Electric Building, of probably nearly two thousand, and that a great many of said employees had business at the headquarters of this plaintiff in the Electric Building. That as to the traffic in the elevators in said building, probably sixty per cent of said traffic was that of employees of this plaintiff, but that on the elevator on which I was injured the traffic thereon consisted almost entirely of employees of the defendant. That the elevator upon which I was hurt was one going to the basement and was a freight and passenger elevator running three floors, but that the public did not have any chance to get into this elevator except occasionally an expressman going in or out might use it. [95]

There were exhibits introduced at this trial as follows:

PLAINTIFF'S EXHIBIT No. 2.

"In the Circuit Court of the State of Oregon, for the County of Multnomah.

No. ——.

JAMES A. FREEBOROUGH,

Plaintiff,

vs.

PORTLAND RAILWAY, LIGHT & POWER CO., a Corporation,

Defendant.

COMPLAINT.

Plaintiff for cause of action against defendant complains and alleges:

I.

That during all the times herein mentioned, the defendant was and now is a corporation organized under the laws of the State of Oregon; that among other things, the defendant is the owner of a building in the City of Portland used as an electric sub-station and office building; that in connection with the operation of said sub-station and building, the defendant owns and operates an electric-driven elevator of the Otis type, which is used in said building for handling freight from the basement thereof to upper stories of said building, and said elevator is also used for passengers; that said elevator is operated by an operator who controls the movement thereof by pulling cables.

II.

That during all the times herein mentioned, the plaintiff was in the employ of the defendant as an electrical machinist; that on October 4, 1923, plaintiff was, engaged in removing for repair, an electrical motor from the basement of said electric building, which had been placed in the carriage or floor of the elevator-car by other employees of the defendant; that said elevator is small in dimension, and the size of the motor parts being hoisted in the elevator were so large, that there was comparatively small space in said carriage for the plaintiff and the operator thereof to stand in.

III.

That plaintiff was steadying the parts of said motor, and as he was so doing, plaintiff's right foot was caused to slip on the floor of said carriage, so that [96] it projected slightly beyond the edge of the car and into a vacant space between the side of the car and the enclosure of the elevator-shaft, and by reason of the negligence of the defendant hereinafter set forth, plaintiff's right foot was crushed between the foot and the knee to such an extent that plaintiff's right leg was amputated about seven inches below the knee.

IV.

That defendant, in maintaining and operating said elevator was negligent and careless, and did not exercise every care and precaution which was practicable to use in this—that between the carriage of said elevator and the shaft in which the elevator travels, there was a space between the edge of the

elevator carriage and the wall from six to nine inches; that eye-beams of the building project out into said space between the basement and the street level; that it would not have impaired the efficiency of the said elevator to have walled in said space so there would be no danger of a person becoming caught between the side of the elevator and the said eyebeams; that in addition thereto, the said carriage of said elevator was not closed in; that it was practical to have closed in the sides of said elevator, and by closing the same, it would not have impaired the efficiency of said elevator carriage; that as a direct and approximate result thereof, when plaintiff's foot slipped, the same became caught between the floor of the elevator-car and the eye-beam of said building, hereinbefore alleged.

V.

That plaintiff was capable of earning as a mechanic, the sum of $200.00 per month; that by reason of his said injuries, plaintiff has lost four months from his work and labor, to his damage in the sum of $800.00, and plaintiff will lose two months additional time before he will be able to perform any work and labor, to his damage in the further sum of $400.00; that plaintiff has suffered great physical pain and mental anguish, and personal injury and loss of earning, to his further damage in the sum of $25,000.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Twelve Hundred and no/100 ($1200.00) Dollars, and for the further sum of Twenty-five Thousand and no/100

($25,000.00) Dollars, and for his costs and disbursements incurred herein.

WM. P. LORD,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, James A. Freeborough being first duly sworn, do depose and say that I am the plaintiff in [97] the above-entitled action; and that the foregoing complaint is true as I verily believe.

JAMES A. FREEBOROUGH.

Subscribed and sworn to before me this 16th day of February, 1924.

WM. P. LORD,
Notary Public for the State of Oregon.
My commission expires Dec. 29, 1924."

PLAINTIFF'S EXHIBIT No. 3.

"Portland, Oregon, November 14th, 1923.

To the State Industrial Accident Commission of the State of Oregon, Salem, Oregon.

Notice is hereby given you that the undersigned, a corporation organized under the laws of the State of Oregon, and qualified to transact business within the State of Oregon, and being engaged in a business or occupation comprehended within the scope and meaning of Chapter 112 of General Laws of Oregon for the year 1913, and filed in the office of the Secretary of State, February 25th, 1913, and approved by the people of the State of Oregon under the referendum on November 4th, 1913, elects not

to contribute to the Industrial Accident Fund created by said act, and not to come within the purview of said act, but the undersigned hereby notifies you that it will not be obligated by said act or any provision or provisions thereof.

PORTLAND RAILWAY, LIGHT AND POWER COMPANY.

By F. I. FULLER,
Vice-President.

[Seal] Attest: C. N. HUGGINS,
Assistant Secretary.

State of Oregon,
County of Marion,—ss.

We, William A. Marshall and E. E. Bragg, Commissioners of the State Industrial Commission of Oregon, do hereby certify that the foregoing notice of rejection, dated November 14, 1913, has been compared with the original and that it is a true and correct copy thereof and the whole of such original notice [98] of rejection as the same appears on file at the office of the State Industrial Accident Commission of Oregon.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed the seal of said Commission this 8th day of January, 1925.

[Seal] WM. A. MARSHALL.
E. E. BRAGG." [99]

That prior to the beginning of the trial the said defendant Insurance Company made a request for the Court to make findings of fact, conclusions of law and a judgment order, as follows:

REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ORDER.

Now comes the defendant in the above-entitled action and in view of the fact that this action is tried before the Court without a jury and that a jury has been waived hereby requests the Court to make the following findings of fact and conclusions of law and judgment order herein, these requests being filed with the Court prior to the submitting of the cause to the Court for consideration:

FINDINGS OF FACT.

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, organized and existing under the laws of Great Britain, is a subject of Great Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action ex-

ceeds Three Thousand Dollars ($3,000.00), exclusive of costs and interest. [100]

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred Dollars ($7,500.00.) against damages resulting from bodily injuries accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained, provided said injury, or claim or expense was within the provisions of said policy.

V.

That the policy of insurance entered into between the said parties is as is alleged in the complaint in Exhibit "A" attached thereto and that the said policy is hereby referred to and made a part of these findings.

VI.

That the said policy mentioned has at all times since April 29, 1922, been in full force and effect.

VII.

That the freight elevator located in said Electric Building, and whereon and in connection with which

bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item 3 of the declaration of said [101] Exhibit "A."

VIII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floors of said elevator and the side walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

IX.

That immediately upon the happening of said accident the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant refused so to do and denied any and all liability on account of or growing out of said accident.

X.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his said injuries, resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19, 1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XI.

That immediately thereafter, on February 19,

1924, this plaintiff delivered said complaint and summons to the defendant and requested it to defend said suit in accordance with the terms and provisions of said Exhibit "A." [102]

XII.

That thereafter, on February 23, 1924, this defendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIII.

That the said plaintiff in said action of Freeborough against the said plaintiiff filed a confession of judgment in favor of the said Freeborough whereby the said plaintiff herein confessed judgment in the sum of $8,000.00 in the Circuit Court of the State of Oregon for the County of Multnomah and that judgment of $8,000.00 was entered in said cause in favor of James A. Freeborough and against the said plaintiff herein, which judgment was one based upon a confession of judgment.

XIV.

That immediately thereafter this plaintiff demanded of the defendant that it satisfy said judgment to the extent of $7,500.00 and that it reimburse this plaintiff for said expense of $500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its denial of any and all liability arising or growing out of said accident.

XV.

That upon the refusal of the defendant to settle and satisfy said judgment to the extent of $7,-500.00, this plaintiff did, on July 10th, 1924, in the necessary protection of its property from sale upon execution, settle and pay said judgment by the payment to the said James A. Freeborough of $7,500.00 in cash and by the delivery to him of an order for future surgical and medical service by the surgical and medical staff of this plaintiff. [103]

XVI.

That upon the happening of said accident to the said James A. Freeborough the plaintiff herein immediately called an ambulance and took the said Freeborough to the St. Vincent Hospital in the City of Portland, Oregon, where a surgeon of the plaintiff herein administered medical and surgical relief, including the amputation of the limb of the said Freeborough as the condition of said Freeborough immediately demanded and that the ambulance and hospital expense incurred and paid by the said plaintiff in said medical and surgical relief to the said Freeborough amounted to $169.75; that the surgeon of the plaintiff and the one who performed the said services was employed by the plaintiff as its general surgeon on an annual retainer to administer surgical and medical relief to the employee of the plaintiff and that the plaintiff did not pay its said surgeon any additional sum for the surgical and medical relief administered to the said Freeborough, but that said surgical and

medical relief was administered to the said Freeborough by said surgeon in the performance of his manual retainer contract with the plaintiff; that the reasonable value of the services rendered to the said Freeborough by said chief surgeon of the plaintiff was the sum of $250.00.

XVII.

That the plaintiff before commencing this action herein demanded payment of the defendant of the amount demanded in the complaint filed in this action and that this defendant refused to pay the said amount or any part thereof.

XVIII.

That the building where the accident happened to the said Freeborough was in Portland, Oregon, known as the Electric Building, which was at the time and still is owned by the plaintiff herein and that the said James A. Freeborough was an employee working and employed by the said defendant and that the said Freeborough's [104] principal place of employment was not in the said Electric Building where he was injured but was in a machine-shop belonging to the plaintiff located at some distance from the Electric Building, in which machine-shop power-driven machinery was used.

XIX.

That the said James A. Freeborough was not engaged in the maintenance, care and upkeep of the building known as the Electric Building where he was injured, which was the building mentioned in the policy of insurance herein.

XX.

That the salary of the said James A. Freeborough working for the said plaintiff at the time of the said accident was not included within the $6,000.00 mentioned as estimated remuneration of employees mentioned in Item 3 of the declarations, being a part of the policy of insurance referred to herein.

XXI.

That the plaintiff has paid $7,500.00 upon said judgment and no more.

XXII.

That the said James A. Freeborough who was employed in the machine-shop where power-driven machinery was used had been ordered by some superior of his to go to the Electric Building, a building also belonging to the plaintiff herein, to procure a piece of machinery for the said plaintiff herein, which service in procuring the said machinery was in the general course of his employment and that while the said James A. Freeborough was getting said piece of machinery for the purpose of taking the same from the said Electric Building to the machine-shop as herein described, he used an elevator in the Electric Building which elevator was one of the elevators described in the said policy of insurance marked Exhibit "A" and attached to the complaint and [105] received an injury to his leg necessitating the amputation thereof above the ankle.

XXIII.

That no premium was charged with respect to any employee of the said plaintiff save and except

a premium of five per cent for every $100.00 of those engaged in the maintenance, care and upkeep of the Electric Buiding, which estimated remuneration was $6,000.00.

XXIV.

That by the terms of said policy the only employees of the plaintiff whose injury or death were covered under the said policy of insurance, which is marked Exhibit "A" in the complaint herein, were those specified in said policy, to wit: those engaged in the maintenance, care and upkeep of the Electric Building.

XXV.

That at the time of the execution of the said insurance policy marked Exhibit "A" and attached to the complaint and at the time of the accident to the said James A. Freeborough and at all times mentioned in the complaint there was in full force and effect within the State of Oregon a Workmen's Compensation Law which governed and prescribed and established the rights, duties and obligations of the plaintiff herein and the said James A. Freeborough and that by the terms of said policy sued upon herein, it was provided that the said policy did not cover injuries to any employee of the plaintiff under any workmen's compensation act or law and that the said Freeborough, at the time of his alleged injury, was an employee of plaintiff and working under and by virtue of the terms of the Workmen's Compensation Law of the State of Oregon. [106]

XXVI.

That James A. Freeborough was a person not covered by all or any of the terms of said policy of insurance herein referred to.

XXVII.

That James A. Freeborough was an employee under the Workmen's Compensation Law of the State of Oregon during all of the times in plaintiff's complaint and herein mentioned.

XXVIII.

That there was no duty upon the defendant to investigate the accident referred to in plaintiff's complaint or to defend plaintiff against any claims or actions presented or brought by said Freeborough against plaintiff herein or to pay or satisfy any judgment secured by said Freeborough against the plaintiff herein.

XXIX.

That plaintiff herein has not at any time acted in the best interest of defendant herein.

XXX.

That no premium was paid by plaintiff to defendant for the purpose of covering any employees of plaintiff other than those referred to and specified in Item 3 of said policy, to wit: those engaged in the maintenance, care and upkeep of the building (Electric Building) and Freeborough was not an employee engaged in the maintenance, care and upkeep of said building.

CONCLUSIONS OF LAW.

Based upon the findings of fact found hereinabove, the Court finds as a matter of law: [107]

I.

That at all the times mentioned in the complaint and at the time of the execution of the said policy of insurance and at the time of the accident complained of in the complaint there was in full force and effect within the State of Oregon a Workmen's Compensation Act or law which governed, prescribed and established the rights, duties and relations of plaintiff with the said Freeborough and that by the terms of said policy of insurance sued upon it was stipulated and agreed between the plaintiff and defendant herein that the said policy of insurance referred to in the complaint should not cover injuries to any employee of the plaintiff under any Workmen's Compensation Law and that the said Freeborough was at the time of his alleged injury an employee of the plaintiff under said Workmen's Compensation Act or Law of the State of Oregon and that by reason thereof the injuries to him referred to in the complaint herein were not covered by the terms of said policy of insurance.

II.

That the Workmen's Compensation Act or Law of the State of Oregon was in full force and effect at the time of the accident mentioned in the complaint herein and at the time of the execution of said policy and that certain and various terms of

the said Workmen's Compensation Act or Law governed the rights, duties, relations and obligations between the said plaintiff and the said James A. Freeborough and this defendant and that by reason thereof the injuries to the said James A. Freeborough were not covered by the policy of insurance mentioned in the complaint, the said Freeborough being an employee of the said plaintiff herein. [108]

III.

That the said James A. Freeborough, being an employee of the said plaintiff herein, was not covered by the said policy of insurance mentioned in the complaint nor was the said plaintiff covered on account of the accident to the said James A. Freeborough for the reason that the said James A. Freeborough, under Condition A of the said policy, was an employee of the assured plaintiff herein and that the employees of the said plaintiff herein were not covered except as is described in Item 3 of the declarations attached to said policy and that such employees as were covered were those engaged in the maintenance, care and upkeep of the building.

IV.

That the said James A. Freeborough was an employee of the assured, plaintiff herein, under the Workmen's Compensation Law of the State of Oregon and his injury in the Electric Building belonging to the plaintiff was not covered by the policy of insurance mentioned herein in the complaint and there is no liability as against the said defendant herein on account thereof.

V.

That the said James A. Freeborough was not an employee of the defendant engaged in the maintenance, care and upkeep of said building and was not covered by said insurance policy mentioned in the complaint and that this said defendant is not liable for any accident happening to the said James A. Freeborough on account of said policy executed to the plaintiff herein.

VI.

That the said defendant is not liable to the said plaintiff herein on account of the accident to the said James A. Freeborough under the policy of insurance mentioned in the complaint and that the evidence in this case and admissions made by the respective parties in the pleadings or otherwise do not show [109] any liability as against this defendant.

VII.

That the defendant herein has not at any time breached any term, covenant, condition or provision of said policy of insurance herein referred to and mentioned in plaintiff's complaint as Exhibit "A" thereto attached.

JUDGMENT ORDER.

Based upon the findings of fact and conclusions of law herein, this Court finds that the said defendant herein is not liable to the said plaintiff under the insurance policy mentioned in the complaint and that the said plaintiff herein has failed to sustain the issues in the complaint and a judg-

ment is hereby entered in favor of the defendant and against the said plaintiff and that the said defendant herein recover its costs and disbursements from the plaintiff. [110]

That prior to the submission of this cause to the Court, the said defendant in error submitted to the Court proposed findings of fact, conclusions of law and a judgment order as follows:

[Title of Court and Cause.]

FINDINGS OF FACT.

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland, Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, and existing under the laws of Great Britain is a subject of Great [111] Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action exceeds Three Thousand Dollars ($3,000.00), exclusive of costs and interest.

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance, attached to the complaint as Exhibit "A" whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred ($7,500,00) Dollars against damages resulting from bodily injuries accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained.

V.

That said contract, except for the breaches of the defendant as hereinafter alleged, is now and has been at all times since April 29, 1922, in full force and effect and this plaintiff has complied with each and every condition thereof by it undertaken. [112]

VI.

That the freight elevator located in said Electric Building, and whereupon and in connection with which bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item III of the declarations of said Exhibit "A."

VII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floor of said elevator and the side walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit "A" under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit "A," to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent of $7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom. [113]

IX.

That immediately upon the happening of said accident, the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant re-

fused so to do and denied any and all liability on account of or growing out of said accident.

X.

That upon the happening of said accident the plaintiff incurred ambulance and hospital expenses for the imperative, immediate, medical and surgical relief of the said James A. Freeborough, in the aggregate sum of One Hundred Sixty-nine Dollars and Seventy-five Cents (169.75); that it was imperative that surgical and medical services should be rendered to the plaintiff and such medical and surgical services, of the reasonable value of Two Hundred and Fifty Dollars ($250.00) were rendered, by the chief surgeon of the plaintiff to the said James A. Freeborough; that the said chief surgeon of the plaintiff was employed by the plaintiff at an annual salary or retainer, to render surgical and medical aid to the employees of the plaintiff and under said contract and annual retainer the said medical and surgical services were rendered to the said James A. Freeborough without additional cost to the plaintiff.

XI.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his [114] said injuries resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19,

1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XII.

That immediately thereafter, on February 19, 1924, this plaintiff delivered said complaint and summons to the defendant and requested it to defend said suit in accordance with the terms and provisions of said Exhibit "A."

XIII.

That thereafter, on February 23, 1924, this defendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIV.

That the allegations of said complaint charging the negligence of this plaintiff as the proximate cause of his injuries were true, and the sum of $8,000.00 was a fair and reasonable compensation for the injuries and damages resulting to said James A. Freeborough from and on account of said accident.

XV.

That thereafter, acting in the best interest of both the plaintiff and defendant herein, this plaintiff as defendant in said suit, filed in said court and cause its confession, whereby it confessed judgment in the sum of $8,000.00 and thereafter on June ——, 1924, a judgment [115] in the sum of $8,000.00 was duly entered in said cause in favor of said James A. Freeborough and against this plaintiff as defendant therein.

XVI.

That immediately thereafter this plaintiff de-

manded of the defendant that it satisfy said judgment to the extent of $7,500.00 and that it reimburse this plaintiff for said expense of $500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its denial of any and all liability arising or growing out of said accident.

XVIII.

That in so denying liability under said Exhibit "A" and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of $7,500.00, as provided by said Exhibit "A," and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of $7,500.00, as provided in said Exhibit "A," and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen Dollars and Seventy-five Cents ($419.75), this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of [116] surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and

Seventy-five Cents ($7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), or any part thereof.

Based upon the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit "A," under Agreement I thereof and was not a person excluded by the terms of agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit "A," to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, to wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), tnd to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident [117] alleged in the complaint and covered by the said policy of insurance.

II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of said James A. Freeborough, to wit, in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars ($7,500.00), violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75).

III.

That the plaintiff should recover judgment of and from the defendant in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), together with its costs and disbursements herein.

CHAS. E. WOLVERTON,
Judge. [118]

[Title of Court and Cause.]

JUDGMENT ORDER.

Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five

Cents ($7,919.75) together with its costs and disbursements hereinafter to be taxed.

CHARLES E. WOLVERTON,
Judge.

March 1, 1926. [119]

That prior to the trial the said Insurance Company, defendant, filed objections to the findings of fact and conclusions of law and judgment order, proposed by the plaintiff, Electric Company.

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER REQUESTED BY PLAINTIFF.

Now comes the defendant herein by its attorneys, and objects to certain of the findings of fact, conclusions of law and judgment order as submitted by the plaintiff herein.

OBJECTIONS TO FINDINGS OF FACT.

The defendant objects to the findings of fact as follows:

I.

Paragraph VIII is objected to for the reason that the said proposed findings do not state the facts in the case nor are the facts as stated in said proposed findings justified by any admissions of the defendant herein or by any testimony adduced at the trial.

II.

The defendant objects to all of the findings in Paragraph X of said proposed findings of fact except the defendant admits that upon the happening of the accident, the said plaintiff incurred an am-

bulance and hospital expense for the relief of James A. Freeborough in the sum of $169.75 and admits that the medical services in the amputation of the leg of said Freeborough and services thereafter were reasonably worth $250.00 and admits that the chief surgeon of the said plaintiff who performed the medical services for the said Freeborough was employed by the plaintiff as an [120] annual salary or retainer to render surgical and medical aid to all of the employees of the plaintiff under said contract and annual retainer and that the medical and surgical services rendered by such surgeon were rendered to the said Freeborough under said annual retainer without additional cost to the plaintiff and that as to all of the facts as proposed by the said plaintiff herein under Paragraph X except as is admitted herein, are not founded upon any admissions of the defendant herein or justified by the evidence.

III.

This defendant objects to the findings of fact as proposed by the plaintiff as stated in Paragraph XIV for the reason that the said finding is not justified by any of the admissions of the defendant or by the evidence introduced herein.

IV.

That the defendant objects to the finding of fact in Paragraph XV of the findings of fact proposed by the plaintiff except the defendant admits that the said plaintiff herein did, in June, 1924, confess a judgment against the plaintiff herein and in favor of James A. Freeborough for the sum of

$8,000.00 and that the judgment was entered upon such confession.

V.

This defendant objects to Paragraph XVIII of the findings of fact proposed by the said plaintiff for the reason that the same is not justified by the admissions of the defendant herein nor by the evidence submitted in this case except that the defendant admits that it has refused to pay to the plaintiff herein the sum of $7,919.75 or any part thereof. [121]

OBJECTIONS TO CONCLUSIONS OF LAW.

I.

This defendant objects to the conclusions of law proposed by the plaintiff herein in finding I for the reason that such conclusion of law is not justified or warranted by the evidence submitted or by the admissions of the defendant herein.

II.

This defendant objects to the conclusions of law proposed by the plaintiff herein in finding II for the reason that such conclusion of law is not justified or warranted by the evidence submitted or by the admissions of the defendant herein.

III.

This defendant objects to the conclusions of law proposed by the plaintiff herein in finding III for the reason that such conclusion of law is not justified or warranted by the evidence submitted or by the admissions of the defendant herein.

OBJECTION TO JUDGMENT ORDER.

This defendant objects to the judgment order proposed by the plaintiff herein for the reason that said judgment order is not justified by the findings of fact nor by the conclusions of law as hereinabove set forth and for the further reason that said judgment order is not justified by the evidence introduced at the trial of this action nor by any admissions of this defendant and for the reason that said proposed judgment order is contrary to the facts and is contrary to the law and is not justified by either the facts or the law.

WHEREFORE the defendant asks the above-entitled court to enter findings of fact and conclusions of law and the judgment order as prayed for by the defendant herein and that a judgment [122] be entered denying any relief to the plaintiff herein and that this action be dismissed with costs and disbursements to the defendant.

Respectfully submitted,
WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant. [123]

That a judgment was rendered against the said defendant herein on the 1st day of March, 1926, as follows:

(Title of Court and Cause.)

"Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from

the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75) together with its costs and disbursements hereinafter to be taxed.

CHAS. E. WOLVERTON,
Judge."

That the within and foregoing, pursuant to an order of this Court, is in substance all of the evidence and the only evidence introduced at the trial of said cause and contains a full and complete and correct transcript of all the proceedings in substance at the trial of the said cause and the same is herewith tendered in this court within the time allowed by law.

This defendant prays that this bill of exceptions may be allowed settled and signed by the Court.

Dated April 9th, 1926.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Defendant.

The foregoing bill of exceptions *and* heretofore lodged with this Court is hereby settled and allowed as the bill of exceptions for use in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a writ of error issued in this cause and this is to certify that the foregoing bill of exceptions contains in substance all of the evidence and proceedings at the trial of the above-entitled cause.

Dated this 12th day of April, 1926.

CHAS. E. WOLVERTON,

Judge of the United States District Court for the District of Oregon.

Filed April 12, 1926. [124]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the annexed writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from four to one hundred and twenty-four, inclusive constitute the transcript of record upon said writ of error in a case in said court in which the Portland Electric Power Company, a corporation, is plaintiff and defendant in error and the Employers Liability Assurance Corporation Limited of London, England, a corporation, is defendant and plaintiff in error; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $523.90, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 1st day of May, 1926.

[Seal] G. H. MARSH,
Clerk. [125]

[Endorsed]: No. 4857. United States Circuit Court of Appeals for the Ninth Circuit. The Employers Liability Assurance Corporation Limited of London, England, Plaintiff in Error, vs. Portland Electric Power Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed May 3, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4857

IN THE

United States Circuit Court of Appeals

17

For the Ninth Circuit

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND, a corporation,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a corporation,

Defendant in Error.

Brief of Plaintiff in Error

Upon a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Board of Trade Building, Portland, Oregon,
REDMAN & ALEXANDER,
333 Pine Street, San Francisco, California,
Attorneys for Plaintiff in Error.

GLASS & PRUDHOMME CO., PRINTERS, PORTLAND.

No._____

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND, a corporation,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a corporation,

Defendant in Error.

Brief of Plaintiff in Error

Upon a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

GLASS & PRUDHOMME CO., PRINTERS, PORTLAND.

STATEMENT OF THE CASE

This action is based upon an insurance policy or contract entered into between the plaintiff in error and the defendant in error prior to the happening of an injury to one Freeborough, an employee of defendant in error.

The policy in question is a liability policy a copy of which is attached to the complaint and is found in the transcript at page 12.

Freeborough was an employee of the defendant in error, and the principal work of the said injured man was at one of the shops of the defendant in error, situated in Portland on the east side of the Willamette River, in which there was power driven machinery.

The defendant in error also occupies a building known as the Electric Building, situated upon the west side of the river in Portland, Oregon, at the corner of Alder and Broadway Streets, approximately a mile from the shop where Freeborough was usually employed. On the day of the accident to Freeborough he had been sent from the shop on the east side of the river to the Electric Building on the west

side of the river to get certain parts of electrical machinery and while taking the said parts out of the basement of the Electric Building to the ground floor upon an elevator, his foot protruded over the floor of the elevator to such an extent that it was caught by an I-beam as the elevator approached the floor and his foot and leg were so injured that the leg had to be amputated below the knee and the said Freeborough claiming negligence on the part of the defendant in error brought an action against it to recover damages on account of said injury. After said action had been brought the defendant in error tendered the complaint to the plaintiff in error requesting that it defend the action and pay any judgment, if one was rendered, up to the limit of the policy.

The plaintiff in error claimed that there was no liability under the terms of the policy on account of the accident to Freeborough because he was subject to the provisions of the Oregon Compensation Law and returned the complaint to the said defendant in error and refused to defend the action.

Thereafter the defendant in error confessed judgment in favor of the said Freeborough in the sum of $8000.00 and paid the said $8000.00, $7500.00 in cash and $500.00 by an order upon the chief surgeon of the defendant in error for medical services as might be necessary on account of the said accident.

The question in issue in this case and the one to be tried upon this appeal is whether or not the policy of insurance covered said injury to Freeborough.

There is in the State of Oregon a Workmen's Compensation Law. In hazardous occupations all parties are **automatically under the compensation law of the State of Oregon,** but the employer or employee may file a notice with the State Compensation Commission of the State of Oregon to the effect that he desires to be **"relieved of certain of the obligations"** therein imposed; said compensation law reading as follows:

Olson's Oregon Code, Section 6614:

"ELECTIVE PRIVILEGE OF EMPLOYERS NOT TO ACCEPT BENEFITS OF ACT.

All persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified, shall be subject to the provisions of this act; provided however, that any such person, firm or corporation **may be relieved of certain of the obligations** hereby imposed, and shall lose the benefits hereby conferred by filing with the commission written notice of an election not to be subject thereto in any manner hereinafter specified, provided, however, that where an employer is engaged in a hazardous occupation as hereinafter defined, and is also engaged in an-

other occupation or other occupations not so defined as hazardous, he shall not be subject to this act as to such nonhazardous occupations, nor shall his workmen wholly engaged in such nonhazardous occupations be subject thereto except by an election as authorized by section 6636; provided, however, that employers and employes who are engaged in an occupation partly hazardous and partly nonhazardous shall come within the terms of this act the same as if said occupation were wholly hazardous."

Relative to the elective privileges of the employees, Section 6615, of the Oregon Code reads as follows:

"ELECTIVE PRIVILEGE OF EMPLOYES—

All workmen in the employ of persons, firms or corporations who as employers are subject to this act shall also be subject thereto; provided, however, that any such workman may be relieved of the obligations hereby imposed and shall lose the benefits hereby conferred by giving to his employer written notice of an election not to be subject thereto in the manner hereinafter specified. * * * ."

No notice of election was given by said Freeborough.

Hazardous employments are described under the Oregon Code as follows, (Section 6617):

"The hazardous occupations to which this act is applicable are as follows: (a) Factories, mills and workshops where power-driven machinery is used."

If the employer desires to be **"relieved of certain of the obligations"** imposed by the compensation law he may do so as is prescribed in Olson's Oregon Code, Section 6620, which is as follows:

"ELECTIVE PRIVILEGE OF EMPLOYER NOT TO ACCEPT ACT—LOSS OF DEFENSE OF FELLOW SERVANT, CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK. Any employer engaged in any of such hazardous occupations who would otherwise be subject to this act, may on or before June fifteenth next following the taking effect of this act, file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund hereby created, and thereupon such employer shall be relieved from all obligations to contribute thereto, and such employer shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act, as if this act had not been passed, and in any action brought against such an employer on account of an injury sustained after June thirtieth

next following the taking effect of this act, **it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his wilful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."**

In Agreement IV. of said policy it is provided that the policy covers bodily injuries including death sustained by any person while within or upon the premises of the assured by reason of the occupation, use, maintenance, ownership or control of the premises by the assured, except as is provided for in Agreement five. Agreement five reads:

> **"This policy shall not cover injuries or death * * * to any employee of the assured under any Workmen's Compensation Act or Law."**

In the declarations attached to said policy, a copy of which is in the Transcript, it is provided in Item 3 that the premises covered is the Electric Building at the northeast corner of Broadway and Alder Streets, including sidewalks, surrounding same, in Portland, Oregon, and covering an office building, 100 x 100 feet, having nine floors and that the yearly estimated remuneration of employees was $6000.00.

It was also provided in Item 3 that **certain specified employees** were covered by the policy namely:

> "Those engaged in the maintenance, care and upkeep of the building at five cents per $100.00."

which means five cents for every $100.00 of wages paid and refers to the premiums charged for the coverage of such specified employees whose wages were **estimated** at the sum of $6000.00.

It is admitted that the said Freeborough was not engaged in the maintenance, care or upkeep of the said Electric Building, in which he was hurt, nor was his remuneration included within the $6000.00 estimated remuneration of said specified employees.

The policy also provided (see Condition A):

> "The premium for this policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the assured, in which case as to such coverage the premium is based upon the entire remuneration, by which term is meant all salaries * * * earned during the policy period by all persons employed by the assured in said business operations, as expressed in Item 3 of the Declarations. * * * * *"

The plaintiff in error claims that said Freeborough was **under** the Workmen's Compensation Law

of the State of Oregon, notwithstanding the said election of the defendant in error not to pay compensation and to be **"relieved of certain of the obligations"** of said compensation law.

As a result of said election defendant in error had imposed upon it **new liabilities created by the act.** Both it and Freeborough were and **remained "under" that law.** By the terms of the statute said election resulted in the **removal of defenses** which but for the law it could have asserted. The evident purpose of the legislature in imposing these **new obligations** upon employers was to induce them to assume the obligation to pay "compensation" to their employees as fixed by the statute. Presumptively therefore the penalties imposed upon employers because of their rejection of statutory "Compensation" were, in the contemplation of the legislature, **equal to or greater than** the "compensation" burden. Otherwise of course employers would not agree to pay "compensation". The legislative scheme would be abortive. Hence **from the point of view of an insurer,** an employer who refused to pay a compensation would not be a better risk than one who did agree to pay "compensation."

Now, concededly, Freeborough would not have been covered by the policy if defendant in error had not rejected "compensation"; and he is no less excluded because defendant in error was willing to take

its chances on damage actions by Freeborough stripped of the defenses specified in the statute.

From an insurance standpoint one risk was as bad as the other, and hence both risks were excluded by the terms of the policy, unless defendant in error was willing to pay an additional premium to cover such risk, as it did in the case of other specified employees of defendant in error. All employees were excluded by the terms of the policy except those upon whose wages an additional premium was charged. There was in the policy both an express and implied exclusion of Freeborough.

SPECIFICATIONS IN ERROR

I.

That the Court erred in sustaining the motion of the defendant in error to strike parts of the amended answer of the plaintiff in error, to-wit: Paragraph eighteen of the said amended answer as shown on page eleven thereof, for the reason that the same stated a good defense to the complaint of the plaintiff.

The point to be urged here is that the said Freeborough was not a person engaged in the maintenance, care and upkeep of said building nor were his wages included in the premium and that therefore the

allegation in paragraph eighteen set up a good defense to the complaint.

II.

That the Court erred in overruling the demurrer filed by the plaintiff in error to the reply to the third, further and separate answer and defense which demurrer was for the reason that the said reply failed to set forth facts sufficient to constitute a reply to the third, further and separate answer of plaintiff in error.

Transcript, page 41.

The point to be urged under this assignment of error is that although the said Electric Company had elected not to contribute to the Compensation Commission of the State of Oregon, that this would not relieve the said Electric Company or the said Freeborough from all the provisions of the Compensation Law of the State.

III.

That the Court erred in making the following Finding of Fact, which is Number VIII in the Findings of Fact finally found by the Court:

Transcript, page 49.

"VIII.

That at the time and place of said accident, the said James A. Freeborough was a person cov-

ered by the terms of said Exhibit A under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit A, to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent of $7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom;"

for the reason that the same was not justified by the evidence or admissions produced at the trial.

IV.

That the Court committed error in making the Finding of Fact as set forth in Paragraph XVIII, as follows:

Transcript, page 52.

"XVIII.

That in so denying liability under said Exhibit A and in refusing to investigate said acci-

dent and in refusing to settle the claims of the said James A. Freeborough to the extent of $7,500.00, as provided by said Exhibit A, and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of $7,500.00, as provided in said Exhibit A, and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen Dollars and Seventy-five Cents ($419.75), this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), or any part thereof."

in that the evidence introduced in this action and the law applicable thereto did not justify the said Finding.

V.

That the Court committed an error in making the Finding of Fact as set forth in Paragraph XIX, as follows:

Transcript, page 53.

"XIX.

That Freeborough was not at the time of injury an employee of plaintiff, or otherwise under or subject to the Workmen's Compensation Act or Law of the State of Oregon."

for the reason that the same was not justified by the law nor by any evidence introduced at this trial.

VI.

That the Court erred in making Conclusion of Law as follows, to-wit: Conclusion of Law No. 1:

Transcript, page 53.

"1. That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit A, under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit A, to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and

to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, to-wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident alleged in the complaint and covered by the said policy of insurance,"

for the reason that the said Conclusion of Law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VII.

That the Court erred in making Conclusion of Law as follows, to-wit, Conclusion of Law No. 2:

Transcript, page 54.

"II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the impera-

tive, immediate, medical and surgical relief of said James A. Freeborough, to-wit: in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75),"

for the reason that the said Conclusion of Law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VIII.

That the Court erred in making Conclusion of Law as follows, to-wit: Conclusion of Law No. 3:

Transcript, page 54.

"III.

That the plaintiff should recover judgment of and from the defendant in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), together with its costs and disbursements herein,"

for the reason that the said Conclusion of Law was

not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

IX.

That the Court erred in giving a judgment order in favor of the said defendant in error, which was in words and figures as follows:

Transcript, page 55.

> "Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75) together with its costs and disbursements hereinafter to be taxed."

Under the specifications of error hereinabove set forth covering those numbered three to nine inclusive, this plaintiff in error claims that the said findings were improper because the policy of insurance referred to and the pleadings, the admissions, and the evidence, all show that the said Freeborough was not a person who was covered by the insurance policy for the following reasons:

(a) That the said Electric Company and the said Freeborough were subject to the provisions of the Compensation Law of the State of Oregon, and limitations therein contained, and

(b) That the said Freeborough was not intended to be covered by the said insurance policy and he was not engaged in the maintenance, care and upkeep of the Electric Building nor was the premium based upon his earnings.

ARGUMENT

I.

Defendant in error contends that Freeborough, its employee at the time of his alleged injury, was **not "under"** the Workmen's Compensation Act of the State of Oregon for the reason that it elected not to contribute to the Industrial Accident Fund. (See Paragraph II, Demurrer and Reply of defendant in error, Transcript page 39.)

Plaintiff in error on the other hand contends that the Workmen's Compensation Law of Oregon is more comprehensive, and that in either event the employer is **under** the law, and that no employer who comes **under** said law in the first instance can by his own act claim entire immunity therefrom.

Section 6614, Oregon Laws (as amended, Chap. 311, Session Laws 1921), provides, among other things:

> "All persons, firms and **corporations** engaged as employers **in any of the hazardous occupations**

hereafter specified **shall be subject to the provisions of this act;** provided, however, that any such person, firm or corporation, may be **relieved of certain** of the **obligations** hereby imposed * * * by filing * * * notice of an election not to be subject thereto * * * ."

Section 6615, Oregon Laws, provides as follows:

"All workmen in the employ of persons, firms or corporations who as employers are subject to this act shall also be subject thereto. * * *"

There is no dispute that in the first instance the defendant in error and Freeborough were subject to and **under** said law. But while an employer can be **"relieved of certain of the obligations imposed by the act"** he cannot be relieved of **all** of the obligations thereby imposed.

Section 6620, Oregon Laws, provides:

" * * * it shall be no defense for such employer (one who exercises an election not to contribute to the state fund) to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his willful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had

knowledge of the danger or assumed the risk which resulted in his injury."

The insurance policy sued on contains the following provision found on the first page thereof:

"Exclusions. Agreement V. This policy shall not cover injuries or death,

* * * * * *

(6) To any employee of the assured **under** any workmen's compensation act or law."

The provisions of the policy (which is a general form applicable to all states) calls for an interpretation of the term **"under".**

This word was considered by the Supreme Court of Illinois in Re McWhirter's Estate, 85 N. E. 918-920, where it was contended that only certain parts of a statute were controlled or governed by other provisos therein contained. In answering the point then urged, the court said:

"We cannot agree with this view. The words **'under this act'** in the first proviso, show that the whole act is referred to, and not the preceding part of the section only."

Plaintiff in error contends that Subdivision (6) of Agreement V of the policy relates to the entire workmen's compensation act and not any particular feature of it.

To the same point is the case of Mills vs. Stoddard, 8 How. 345, 17 Dec. of Sup. Ct. U. S. 620-625, where a similar phrase was under consideration and the Supreme Court of the United States, speaking through Justice McLean, wrote:

> "That 'under the law' does not mean, 'in pursuance of it', or 'in conformity with it', but an act assumed to be done under it.
>
> The word 'under' has a great variety of meanings. But the sense in which it was used in the proviso is, 'subject to the law'. We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it."

Hughes vs. Doyle, 44 S. W. (Tex.) 64-65, interpreting a similar clause, held:

> "We do not think that the purpose of the use of the words **'under authority of law'** as first employed in the section, was merely to empower the Legislature to authorize the commissioner's Court to act in the premises, but that it was, rather, to make their action subordinate and subject to legislative control."

In Hostetter vs. City of Pittsburgh, 107 Pa. St. Rep. 419-431-432, the court considered the phraseology "shall arise under this contract" and determined:

> "the reasonable and manifest meaning and sense of 'under' in the connection in which it is used,

is 'the subject of' or 'covered by' the contract. This is not only the plain and palpable import of 'under' but it corresponds with the meaning of the word as given by both Worcester and Webster."

To similar effect is the holding of Shiras, J., in the case of Bates vs. Independent School Dist., 25 Fed. 192-194, where we read at page 194:

"The recital relied upon in the present case is that the bonds were issued 'under provisions of sections 1821, 1822, and 1823, of the Code,' etc. Does the word 'under' mean the same as the phrases 'in pursuance of,' 'in conformity with,' 'by virtue of,' or 'by authority of'? These all fairly imply a compliance with the provisions of the statute, because it cannot be justly said that bonds issued in violation of a statute are issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute thus violated. The word 'under,' however, has a different signification. Primarily it is the correlative of 'over' or 'above,' and signifies being in a lower condition or position; and, secondarily, it indicates a relation of subjection or subordination to some superior power, higher authority, or controlling fact. Thus, when it is said that the citizens of a given state are living under the constitution and laws of the state, it is not asserted

that all such citizens are living in conformity with such constitution and laws, but only that they are subject to such constitution and laws. They may live under them and conform thereto, or may live under and violate them. When it is asserted that certain bonds are issued in pursuance of, or in conformity with, the provisions of a given statute, this is an assertion that in issuing the bonds the provisions of the statute have been followed or conformed to; but when the recital is only that the bonds are issued under the provisions of a given statute, this simply asserts that the bonds are subject to or controlled by the provisions of the statute named; or, in other words, the purchaser is thereby informed where he should look in order to learn what the provisions of the statute are which confer and limit the power to issue the bonds."

It is the contention of the plaintiff in error that notwithstanding defendant in error elected not to **contribute to said fund** in order to secure so-called compensation payment to its employees who might receive injuries, it and the employee, Freeborough, were **"under the terms of said compensation act"** which imposed obligations on the defendant in error **not imposed prior to the passage of said act.** (Sec. 6620, Oregon Laws.) The insurance policy in question is a "general liability policy" which covers all

persons except those named in Agreement V, said exceptions including employees in states which have compensation laws, which either impose on the employer an obligation to pay compensation or other obligations in the event of an election not to pay compensation. In such states employees are excluded by this form of policy except such as are specifically named in the policy, and for whom a premium is charged.

It makes no difference whether under a compensation law the employer elects to disclaim compensation, he and his employees are still under the "compensation" statute. In either case his employees are excluded by the terms of the insurance policy because if the employer does not elect to accept compensation obligation, he is still "under" the act, and has imposed upon himself other obligations which are just as, or even more, onerous than the compensation obligation. (The removal of the common law defenses.)

An employee, as in the case of Freeborough, becomes a preferred litigant "under" the compensation law where an employer disclaims the compensation feature. Such an employee has greater rights than he theretofore had; rights superior to the public. It makes no difference whether the employer elects to contribute to the fund provided for under the compensation act or not, he and his employees are still under the compensation law. It is for this reason

that employees, wherever compensation laws exist, whether optional or not, are excluded from the policies; the right to elect to disclaim compensation imposes upon the employer **equivalent or greater burdens** which inure to the benefit of the employee. Therefore, it is wholly immaterial whether the compensation law has or has not an option proviso. In either case the employer and employee are **"under"** the act. Hence it made no difference in this case that the defendant in error disclaimed the "compensation" **feature** of the law. This "compensation" (so-called) law **is more than a law providing for the payment of compensation.**

The election on the part of the employer not to avail itself of the compensation **feature** does not result in his ridding himself of the **obligations imposed upon him** by the terms of the so-called "compensation" law nor deprive the employee of the **benefits bestowed upon him under the act.**

It is because of such new obligations, **whether in the form of obligation to pay compensation** or **because the employer is stripped of his common law rights and added privileges are given to the employee** that an additional premium charge is made where employees are covered by the policy.

Freeborough was not in the same position "as if this act had not been passed." He was **"under"** the act

and by virtue thereof was in a **superior position** and was put there **by the terms of the act.** We reiterate that defendant in error **cannot reject the act.** It cannot possibly free itself from the **entire obligations which the act imposes upon it.**

Freeborough and his employer were subject to the law. They were within the jurisdiction of that law and were subject thereto. Their conduct and their actions were subordinate and subject to and **"under"** its control.

The policy exception (general in terms and intended by the insurer to apply to all states) is not aimed at the **compensation feature of the act.** It is aimed at the **entire act.** The exception is perfectly clear and relates "to any employee of the insured **under any workmen's compensation act or law,"** and as said by the Supreme Court of Illinois in Re McWhirter's Estate, supra:

> "The words 'under this act' in the first proviso, show that the whole act is referred to, and not the preceding part of the section only."

It can not be denied that there is a "compensation law" in Oregon regardless of whether the employer pays compensation or not, and necessarily the defendant in error and Freeborough were "under" the act and by virtue of the plain exception of the policy

in question Freeborough was excluded from the provisions thereof.

The exception in the policy does not mention or refer in any wise to the acceptance or rejection of the optional feature of any workmen's compensation law, and we do not see how it can be seriously contended that Freeborough as well as the Electric Company were not under the act in question.

> "That 'under the law' does not mean, 'in pursuance of it' or 'in conformity with it', but an act assumed to be done under it.
>
> "The word 'under' has a great variety of meanings. But the sense in which it was used in the proviso is, 'subject to the law'. We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it."
>
> Mills vs. Stoddard, 17 Dec. Sup. Ct. U. S. 620, 625.

The compensation law was superior and paramount to the rights and liabilities of the defendant in error and Freeborough and their activities were in subordination to its provisions.

Defendant in error has erroneously assumed that when the employer refuses to contribute to the State Compensation Fund that the Compensation Law is

at an end **and has no application whatsoever.** But of course hazardous occupations coming under the law are still affected by it; for it provides for **benefits to employees and for the removal of defenses which but for the act the employer could assert.**

The employer has two options under the compensation law, one is to contribute to the fund and have the state pay the compensation, and the other to refuse to contribute to the fund and run the risk of damage actions with specified defenses removed.

Freeborough was an employee of defendant in error and it elected not to contribute to the state fund and the result is that it has had certain of its defenses taken away, and this is **under** and by virtue of the compensation law of the State **and the Compensation Law governs the situation and determines all rights of the parties before and after such election.**

II.

Another consideration that strongly reinforces the position taken by the plaintiff in error is that by the terms of the policy, **certain designated employees were covered and an additional charge made for such coverage.**

It is provided in "Condition A" of the policy:

> "The premium for this policy is as expressed in Item 3 of the declarations except as this policy

> covers injuries * * * to employees of the assured, in which case, **as to such coverage** the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the assured in the said business operations as expressed in Item 3 of the declarations."

This clause clearly demonstrates that the policy in question was not intended to include employees **except as particularly specified therein** and (to use the language of "Condition A") **"as to such coverage"**, which can only mean coverage as to employees of the assured, the premium for such coverage is based upon the entire remuneration

> "earned * * * by all persons employed by the assured in the said business operations as expressed in Item 3 of the declarations." (Transcript, page 12.)

Item 3 of the declarations refers to employees **"engaged in the maintenance, care and upkeep of the building".**

There is no contention that the salary or compensation paid to Freeborough is included in the "estimated remuneration of employees" set forth in said Item 3 at $6000.00.

Condition A provides that the employees and only the employees whose remuneration is set forth in

Item 3 of the declarations are the ones covered by the policy, because the only premium charged for covering employees are those mentioned in Item 3 of said declaration and whose estimated remuneration amounts to only $6000.00.

Condition A clearly shows that the interpretation of Clause (6) of Agreement V herein urged is the only sound and consistent interpretation that can be placed on it. The language of the **exclusion** is plain as excluding any employee **under** any workmen's compensation act or law, and we contend, Oregon being a state in which there exists a "compensation" law, all employees except those specified in the policy were excluded.

In conclusion the plaintiff in error contends that there is no responsibility upon its part under the policy for two reasons:

(a) That the policy does not cover injuries to employees of the assured under any workmen's Compensation Law of Oregon or any other state.

The compensation law of Oregon applies in all phases of this case at all times as between the employee, the assured Electric Company and the plaintiff in error, and notwithstanding that the Electric Company had elected to be relieved of **certain** responsibilities of the act (see Oregon Code, Section 6614) still the parties were subject to the provisions

of the act, and a provision of the act that still remained, and was obligatory upon all the parties, was that the employer Electric Company, and incidentally the plaintiff in error, would be stripped of all of the common law defenses.

(b) That said Freeborough was not within the terms of the policy because Condition A of the policy provides that the premium is as expressed in Item 3 of the Declarations and that as to coverage the premium is based upon the entire remuneration earned during the policy period by the persons described in Item 3 of the Declaration. Item 3 of the Declarations covers only those engaged in the maintenance, care and upkeep of the Electric Building at the rate of five cents for every one hundred dollars of wages paid and the estimated wages for such employees was $6000.00 per year. Freeborough was not employed in the Electric Building, but was only there temporarily and it is admitted that he was not engaged in the care, maintenance and upkeep of the Electric Building; and it is also admitted that his wages were not included within the $6000.00 estimated remuneration.

We submit it is an irresistible conclusion that Freeborough was not an employee covered by this policy, and also that all of the parties at all stages of the controversy were governed by and were under the

Compensation Law of the State of Oregon. The judgment should therefore be reversed.

Respectfully submitted,

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No. 4857

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND, a corporation,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

GRIFFITH, PECK & COKE,

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Attorneys for Defendant in Error.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE

This is an action instituted by the Portland Electric Power Company, a corporation, defendant in error, to recover from the Employers' Liability Assurance Corporation Limited of London, England, a corporation, plaintiff in error, under an insurance policy covering

accidental injury to persons upon the elevators of the Electric Building in Portland, Oregon.

The defendant in error is engaged in the business of generating and distributing light and power to many communities in Oregon and Washington, including the City of Portland, and also operates interurban railway lines in Oregon and the street railway system in the City of Portland. The said Electric building is owned by the defendant in error, and is the headquarters for its activities; as appears from the evidence, sixty (60) per cent. of the traffic upon the elevators of said building is the carriage of the employees of the defendant in error. The Electric building has nine floors and eight floors of the building are occupied by offices of the defendant in error. Field employees of the defendant in error report to the main offices of the Company in the Electric building and for that reason the employees' traffic upon the elevators is very heavy.

On October 4th, 1923, James A. Freeborough was injured while riding upon a freight elevator which is specifically described in Item 3 of the Declarations of the policy of insurance.

The said Freeborough filed his claim for damages arising out of his injuries against the defendant in error and the defendant in error referred the claimant, under the terms of said policy, to the plaintiff in error. The plaintiff in error denied liability under said policy

and on February 17, 1924, the said Freeborough filed suit against the defendant in error in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his said injuries; on February 19, 1924, said complaint, together with summons, was duly served upon the defendant in error and immediately thereafter, and upon the same day, the defendant in error delivered said complaint and summons to the plaintiff in error and requested it to defend said suit in accordance with the terms and provisions of said policy of insurance; thereafter, on February 23, 1924, the plaintiff in error returned said complaint and summons to the defendant in error and denied any liability under said policy and refused to assist in the defense of said suit.

Thereafter, on June ..., 1924, a judgment in the sum of Eight Thousand ($8,000) Dollars was duly entered in the last mentioned suit, in favor of the said Freeborough and against the defendant in error; the plaintiff in error refused to satisfy said judgment to the extent of Seven Thousand Five Hundred ($7,500) Dollars, the limit of its policy, and refused to reimburse the defendant in error for its expenses incurred in the imperative surgical and medical relief of the said Freeborough at the time of the accident.

On July 10, 1924, the defendant in error paid said judgment and on July 15, 1925, filed in the District Court of the United States for the District of Oregon,

this suit to recover Eight Thousand ($8,000) Dollars under the terms of said policy of insurance.

Thereafter issue was joined, trial was had, and on March first, 1926, judgment was entered in favor of the defendant in error and against the plaintiff in error, in the sum of Seven Thousand Nine Hundred Nineteen Dollars and Seventy Five Cents ($7,919.72), plus costs and disbursements.

From the judgment last mentioned the plaintiff in error brings this appeal.

There is no question but what the locus of the accident is covered by the policy, nor is there any question raised as to the amount of the judgment.

The plaintiff in error contends that the policy did not cover injuries to James A. Freeborough for the reasons: First, that he was an employee of the defendant in error under the Workmen's Compensation Act of Oregon, and second, that he was not an employee of the defendant in error engaged in the maintenance, upkeep and care of the Electric building and his wages were not included in the rate base of said policy.

POINTS AND AUTHORITIES

1. MATERIAL EXCERPTS FROM POLICY:

"Coverage. This Policy covers, except as provided in Agreement V, bodily injuries, including

death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition." Agreement IV.

"Exclusions. This Policy shall not cover injuries or death, * * * (6) to any employee of the Assured under any Workmen's Compensation Act or Law." Agreement V.

"Basis of Premium. The premium for this Policy is as expressed in Item 3 of the Declarations except as this Policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration (by which term is meant all salaries, wages, earnings for overtime, piece work or contract work, bonuses or allowances, also the cash equivalent of all merchandise, store certificates, credits, board or any other substitute for cash) earned during the Policy period by all persons employed by the Assured in the said business opera-

tions as expressed in Item 3 of the Declarations." Condition A.

2. If the employer accepts the Workmen's Compensation Act of Oregon then his employees are under the Act, but if the employer rejects the said Act, then his employees are not under the Act.

Sections 6616, Oregon Laws.

Section 6620, Oregon Laws.

Section 6621, Oregon Laws.

Evanhoff State Industrial Accident Commission, 78 Oregon 503.

State Ex. Rel. Marshall v. Roesch, 108 Oregon 371.

3. "It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured: Hoffman v. Aetna Ins. Co., 32 N. Y. 413 (88 Am. Dec. 337); Darrow v. Family Fund Society, 116 N. Y. 537 (22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495); American Surety Co. v. Pauly, 170 U. S. 133 (42 L. Ed. 977, 18 Sup. Ct. Rep. 552); Sneck v. Travelers' Ins. Co., 88 Hun. 94 (34 N. Y. Supp. 545).

Moore v. Aetna Life Insurance Co. 75 Oregon 47, 53.

Cochran v. Standard Accident Insurance Co. of

Detroit (Mo.), 271 S. W. 1011.
Huschbros v. Maryland Casualty Co. (Ky.), 276 S. W. 1083.

ARGUMENT

In the following argument we will discuss the two contentions of the plaintiff in error:

First, that the said James A. Freeborough as an employee of the defendant in error, which had rejected the Workmen's Compensation Act of Oregon, was nevertheless under the Workmen's Compensation Act of Oregon and was excluded from protection under sub-paragraph (6) of Agreement V of the policy, and

Second, that the said James A. Freeborough was not an employee covered by the terms of the policy because he was not engaged in the maintenance, care and upkeep of the Electric building and his wages were not calculated in the rate base of the policy.

I.

As to the Workmen's Compensation Act of Oregon. Agreement IV of the policy provides:

> "Coverage. This Policy covers, except as provided in Agreement V, bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or

the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition."

It is noted that this is the paragraph of the policy designated as the "coverage paragraph". Under this paragraph we look to find what injuries are covered and protected under the terms of the policy. The above paragraph specifically provides that "except as provided in agreement V" the policy covers bodily injuries accidentally sustained *"by any person"* while upon the premises described in the declarations. There is no dispute but what the elevator in the electric building was described in the declarations and hence, unless the said Freeborough was excluded by the terms of agreement V, the accident was expressly covered by the terms of agreement IV. In agreement V, which is designated as the paragraph of "exclusions" and in which, under the express terms of agreement IV, we must find the only exceptions to the coverage of all accidents upon the elevator in question.

The plaintif in error insists that the following clause of agreement V excludes the said Freeborough from protection under the terms of the policy, to-wit:

"This policy shall not cover injuries or death * * * (6) to any employee of the Assured under any Workmen's Compensation Act or Law."

The precise question then comes, was the said Freeborough under the Workmen's Compensation Act of Oregon, within the intent of the parties to the policy and under a fair construction of the terms of the policy?

The plaintiff in error brings this appeal upon the proposition that the said Freeborough was under the Workmen's Compensation Act of Oregon and, therefore, excluded from protection under the policy. The defendant in error contends, and the lower court found, that the said Freeborough, within the intent of the parties to the policy and under a fair interpretation of the terms of the policy, was not under the Workmen's Compensation Act of Oregon and was, therefore, not excluded from coverage under the policy.

EMPLOYMENT OF FREEBOROUGH

The said Freeborough was an electrical machinist and was not employed by the defendant in error at the electric building, but was employed in a shop of the defendant in error across the Willamette River from the said electric building and in another part of the City of Portland. In the basement of the said electric building is an electric substation where is located considerable electric equipment necessary to the conduct of the said

substation, but having nothing to do with the maintenance, care or upkeep of the electric building.

At the time of the accident the said Freeborough was ordered to go from his shop across the River in Portland to the electric building to make some repairs in the electrical equipment in the substation. The said Freeborough found it necessary in making such repairs to take some part of the equipment back to his shop, and he was so removing said equipment, upon the elevator in said electric building, for the purpose of making the necessary repairs thereon, when the accident occurred.

The hazard of the use of the elevator by Freeborough was exactly the same hazard as would have resulted from the use of said elevator by the employee of any contractor to whom the Portland Electric Power Company might have let the contract to repair the equipment in the substation. If John Jones, as the employee of John Smith, suffered the same accident, then there would be no possible question but what his injuries would have been covered by the terms of the policy.

USE OF ELECTRIC BUILDING

The said electric building is a nine story building and, excepting for the substation in the basement and sub-basement, and except for the seventh floor, is occupied by the defendant in error as a headquarters office

building from whence its activities in Oregon and Washington, in the generation and distribution of light and power and in the operation of interurban and city railways, are directed.

The Portland Electric Power Company has about four thousand employees and less than two hundred and fifty of such employees have offices in the electric building, but all of such employees at some time or other, have to do business with the general offices in the electric building. As a result the traffic on the elevators in said building is very largely the carriage of employees. The evidence shows that such carriage of employees is sixty (60) per cent. of the traffic.

If the said Freeborough was not protected under the terms of the policy, then an accident to a conductor on street cars who might come to the building to make his report, would not be protected; nor would accidents upon the elevators of said building to the employees of the Company who live at Salem and Hillsboro, Oregon, or Vancouver, Washington, be covered.

In the interpretation of the terms of the insurance policy the intention of the parties should be ascertained and the policy construed accordingly.

There can be no question but what it was the intention of the defendant in error, in entering into this insurance contract, to cover all the traffic upon its ele-

vators. It would have been most unwise for the defendant in error to have insured only forty (40) per cent. of the traffic upon its elevators and left sixty (60) per cent. of such traffic without protection. Especially would this be true when we consider that the Employers' Liability Act in Oregon has withdrawn the damage limit of Seven Thousand Five Hundred ($7,500) Dollars in case of death of an employee resulting from his employment.

On the other hand there is no reason why the plaintiff in error should have sought to exclude from the protection of the policy the employees' traffic on the elevators; the hazard of such traffic was not increased by reason of the employment, except in the case of engineers, janitors and window washers, who were engaged in the care and upkeep of the building, and such additional hazard was specifically covered by providing an additional premium of five cents per One Hundred Dollars of premium.

The premium of this policy was not based upon a forty per cent. use of said elevators but was based upon a one hundred per cent. use; sixty per cent. of such use was the carriage of employees.

The intent of the plaintiff in error not to exclude all employees of the defendant in error is plainly shown by the fact that the employees "engaged in the maintenance, care and upkeep of the building" are specifically included at an additional premium.

If agreement V excludes all employees of the defendant in error, then those "engaged in the maintenance, care and upkeep of the building" are also expressly excluded, for the janitors and window washers of the building are engaged in hazardous occupations and are as much under the Workmen's Compensation Act of Oregon as was the said Freeborough.

If protection, on account of the injuries to Freeborough, was excluded, then protection to those engaged in the care and upkeep of the building was likewise excluded.

The plaintiff in error is inconsistent in contending that some employees of the defendant in error were under the Workmen's Compensation Act of Oregon and that other employees were not under said Act. All employees of the defendant in error were affected in the same way and to the same extent by the rejection on the part of the defendant in error of the Workmen's Compensation Act, and after such rejection the plaintiff in error cannot urge that John Jones, a janitor and window washer of the said electric building, was under the protection of the policy and that the said Freeborough, as an electrical mechanist of the defendant in error engaged in the repair of equipment in the substation of said building, was not under the protection of said policy.

The reason of mentioning "those engaged in the maintenance, care and upkeep of the building" and including an additional premium for such employees, was by reason of the additional risk and hazard which such employees encountered in the care and upkeep of the building, in excess of the risk and hazard encountered by other employees and members of the public. The employees engaged in the maintenance, care and upkeep of the building, are on the roof, the window ledges, and are operating the elevators inexpertly during nights and holidays when the regular operators are not in charge of elevators. As a result of such additional hazard on the part of such employees, an additional premium was charged for protection against such risk and hazard.

Reading the policy in the light of the circumstances of the parties, the protection desired, and the consideration received therefor by the plaintiff in error, there can be no question but what it was the intent of both parties to cover fully the operation of the elevators in said building.

It is the duty of this court to construe this policy so as to effectuate the intent of the parties at the time of entering into the same, rather than to give the plaintiff in error the opportunity, under a highly technical construction of the contract, to renege and escape the logical and contemplated effect of its insurance wager.

WAS FREEBOROUGH "UNDER" THE OREGON WORKMEN'S COMPENSATION ACT?

The plaintiff in error is before this court demanding that, contrary to the intention of the parties, the policy of insurance be construed so that the said Freeborough will be found to be "under" the Oregon Workmen's Compensation Act, and, therefore, excluded from protection under the policy by the terms of agreement V.

It is admitted that the defendant in error rejected the Workmen's Compensation Act of Oregon and hence, the sole question is one of interpretation by this court of said exclusion clause of agreement V of the policy, to determine whether Freeborough, after the rejection of the Workmen's Compensation Act by his employer, was, within the meaning of said exclusion clause, under the Oregon Workmen's Compensation Act.

The advancement of this argument is most surprising to the defendant in error for the plaintiff in error, and all other Insurance Companies in Oregon, have, since the passage of the said Act, pleaded for casualty insurnace of employees in the hopes of regaining the casualty business which was lost by the Insurance Companies upon the passage of the act. If this interpretation of the policy were correct, then the plaintiff in

error would be free of liability from an accident to any employee engaged in a hazardous occupation in any State where a Workmen's Compensation Act was in effect, regardless of whether the employer had rejected or accepted the terms of such Act.

The purpose of excluding employees who are under the Employers' Liability Act is to avoid double protection to the employee and thereby stimulate fraud and malingering with consequent increase of accident cost.

It is true, as contended by the plaintiff in error, that all employees engaged in hazardous occupations are, since the passage of the Oregon Workmen's Compensation Act, subject to more favorable conditions of recovery of damages for personal injuries in suits against employers, by reason of the deprivation of the employer of certain defenses; but, by the terms of the Act itself, these benefits accrue only to those employees who are *not* under the Act; these benefits do not accrue to employees who *are* under the Act.

The Act itself segregates employees into two classes, —(1) those under the Act, and (2) those not under the Act, and the Act says to employees, in effect: "If you are *under the Act* then you will receive compensation and you must also contribute to the Industrial Accident Fund, but if your employer will *not* come under the Act so that you will be under the Act and entitled to compensation, then your employer will be

penalized for not coming under the Act by limiting his defenses in any suit which you may bring against him for personal injuries growing out of your employment."

Even if an employer accepts the Act so as to come under the Act, still the employee may, by proper notice, withdraw from the protection and obligations of the Act and upon such notice of withdrawal, the employee would certainly not be under the Act.

The taking away of the defenses of an employer by the terms of the Act was a leverage to force employers *under the Act;* and if they did not accept the Act. they were not *under the Act,* nor subject to its protection; the employer, or employee, is either under the Act, or not under the Act, dependant upon the acceptance or rejection of the Act by the employer, or upon the rejection of the Act by the employee after acceptance by the employer; as stated by Judge McBride in Evanhoff vs. State Industrial Accident Commission, 78 Ore. 503:

> "As before noted the Act leaves the employer free to accept the provisions of the Act or to reject them as he may see fit. If he gives notice that he rejects them, he is left to protect himself from actions for personal injury by litigation in the courts. It is true that the act has swept away certain defenses heretofore available; but, as this could have been done in any case, he has no legal reason to complain. If he sees fit not to avail himself of

the provisions of the Act, he may still protect himself by giving notice that he rejects its provisions. It is not compulsory, and the arguments that apply with greater or less force to compulsory acts are here inapplicable. The State says to the employer and employee alike:

'We present to you an plan of accident insurance which you may accept or reject at your own pleasure. If you accept, you must be bound by its terms and limitations; if you reject it, the courts are open to you with every constitutional remedy intact. Take your choice between our plan and such remedies as the statute gives you.' "

Again in the same case,—(Page 519):

"The State proposes to employers and employees an accident and life insurance scheme, and offers it to them in lieu of litigation. It does not compel them to become participants in it or to contribute to it, but if they voluntarily choose to do so, they waive any other remedy, because the statute provides as a part of the scheme that they must do so; and, as before observed, by permission of the statute a party may waive or limit the quantum of his compensation for any possible prospective injury. The non-compulsory feature of the act may be said to eliminate most of the objections urged upon constitutional grounds."

From the foregoing interpretation of the Act, by Chief Justice McBride, it appears that there is no question in his mind as to when an employer or employee is under the Act or outside of the Act; from his interpretation of the language of the Act, its purposes and intent, —one is led irresistibly to the conclusion that if an employer accepts the Act then his employees are under the Act, but if the employer rejects the Act, then his employees are not under the Act.

This interpretation is also confirmed by the language of Section XI of the original act in the Oregon Law—6616, which provides:

> "All workmen in the employ of persons, firms or corporations, who as employers, are subject to to this Act, shall also be subject thereto; provided, however, that any such workman may be relieved of the obligations thereby imposed and shall lose the benefits thereby conferred, by giving to his employer written notice of an election not to be subject thereto, in the manner hereinafter specified."

From the last quoted section we must conclude that an employee who himself rejects the Act, or whose employer has rejected the Act, is not "subject to" or under the terms of the Act.

In the instant case the defendant in error rejected the terms of the Act, and Freeborough, as its employee,

was, by reason of such rejection on the part of the defendant in error, not "subject to" or under the Act.

Counsel for plaintiff in error has cited several cases holding that the phrase "Under the Act" should be interpreted as "subject to the Act". We have no controversy with the plaintiff in error as to such a definition.

In Section 6620 and in Section 6621 of Oregon Laws and numerous other sections of the Workmen's Compensation Act, the language of the Act unequivocably shows that it was the intention of the legislature to provide that an employee was subject to the Act only in case his employer accepted the Act without rejection by the employee, but if the employer rejected the Act, then there is no provision under which the employee may become subject to the Act, and he, upon rejection of his employer, is excluded from the protection of the Act.

The Supreme Court of Oregon, in various cases dealing with the terms of the Workmen's Compensation Act, has made very clear in every case, that the fact as to whether or not an employer was under the terms of the Act, depended upon his acceptance or rejection of the terms of the Act.

We quote from Justice Rand, in the case of State Ex. Rel. Marshall v. Roesch, 108 Ore. 371:

> "The employer, if he then desires to come under the operaion of the act, is permitted to file with the

commission a notice in writing, giving ten days' notice of his election to contribute under the act * * * "

The same Court in the same case, quoted the following, with approval, from a Michigan Court: (Page 373)

"It (the Act) does not compel an employer to accept its terms for any of his business activities, unless he chooses to do so. He is free to come under the law or to stay out. This being so, why may he not accept its terms as to one business and not as to another? Inasmuch as the election lies with him whether he will come under the law, I can see no good reason why he should not be permitted to accept its terms for one distinct business and not for another."

Again, in the same case (page 374), the Court says:

"In the instant case the defendant, when he took over the construction of the garage, filed with the commission the written notice required from one who elects not to come within the provisions of the act. By so doing he excluded himself from the operaion of the act so far as it applied to the construction of the garage."

Applying the foregoing language to the instant case, we find that the defendant in error by rejecting the Act,

"excluded itself from the operation of the Act" and thereby the employee was excluded from the operation of the Act, for there is no way by which an employee may come under the Act unless his employer is first under the Act.

Thus, from the terms of the Act, and from the interpretation of such terms by the Supreme Court of Oregon, we find that there can be no misunderstanding of ordinary language bearing on the question, as to when an employee is under or without the terms of the Workmen's Compensation Act; if the employer has rejected the Act, as in the instant case, then neither the employer nor the employee is subject to or under the terms of the Act.

But if there is any question in the mind of the court as to the proper interpretation of the policy, then under all rules of interpretation of insurance policies, the policy must be interpreted most strongly against the insurer who prepared the insurance contract.

We do not admit that there is any ambiguity in this contract but on the contrary it is the contention of the defendant in error that the intent of the parties to include, under the terms of the policy, the said accident to Freeborough is too plain for argument.

However, if there is any doubt in the mind of this court as to the proper interpretation of said subpara-

graph (6) of agreement V of said policy, then this court is bound to construe the same against the interpretation demanded by the Insurance Company under that rule of law which is well stated by Justice McBride in the case of Moore v. Aetna Life Insurance Co., 75 Ore. 47, 53:

> "It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured: Hoffman v. Aetna Ins. Co., 32 N. Y. 413 (88 Am. Dec. 337); Darrow v. Family Fund Society, 116 N. Y. 537 (22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495); American Surety Co. v. Pauly, 170 U. S. 133 (42 L. Ed. 977, 18 Sup. Ct. Rep. 552); Sneck v. Travelers' Ins. Co., 88 Hun. 94 (34 N. Y. Supp. 545.)

That the policy is "reasonably susceptible" of the interpretation claimed by the defendant in error is evident by the fact that Judge Wolverton in overruling the demurrer of the plaintiff in error, filed his opinion as follows:

> "This case is here for the second time for interpretation of the policy upon which the action is based. It is now insisted by defendant, in support of its demurrer to plaintiff's reply, that, because of the following clause found in the policy, namely,

'This policy shall not cover injuries or death * * * to any employee of the assured under any Workmen's Compensation Act or Law,' it does not cover under the conditions present.

It is admitted that the Workmen's Compensation Act was rejected by plaintiff, and the reply declares that the employee Freeborough did not elect to come under its provisions.

The acts, as I read it, so far as applicable, places employers primarily under its provisions, but they may escape its operation by rejecting the same in manner prescribed. The employees are not primarily within its purview; nor does it affect them unless they elect to avail themselves of its provisions. When the employer rejects the act and the employee does not elect to avail himself of its provisions, neither is henceforth under the Act. So that the clause relied upon for relief from liability on the part of the defendant does not operate here as an exception to liability under the policy. The demurrer to the reply will therefore be overruled."

Transcript of Record, 43-44.

We do not believe that even the plaintiff in error would contend that Judge Wolverton is an unreasonable interpreter of the law, and we feel that the plaintiff in error will admit that any interpretation made by

Judge Wolverton of the terms of said policy is an interpretation which is "reasonably susceptible."

The court in the case of Cochran v. Standard Accident Insurance Company of Detroit (Mo.), 271 S. W. 1011, has laid down this rule:

> "When an insurance contract is so drawn as to be 'fairly susceptible' of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured."

That Judge Wolverton is a reasonably intelligent man and that he honestly construed the terms of said policy will certainly be admitted. If such an admission is made, then under the aforequoted rule of law we must adopt that interpretation of the policy "which is most favorable to the insured."

II.

SALARY OF FREEBOROUGH NOT A BASIS OF PREMIUM

As a secondary technical defense the plaintiff in error insists that the said Freeborough was not protected under the terms of said policy because he was admittedly an employee of the defendant in error and his

salary was not included as a basis for the fixing of the premium.

By the express terms of agreement IV the policy covers

> "bodily injuries * * * accidentally sustained by any person or persons while within or upon the premises described in the Declarations or elsewhere by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of said premises and their maintenance in good condition."

We should note that this policy covers the occupation, use and maintenance of the premises by the assured. Certainly it was intended that the assured should occupy and use the premises by and through its employees, agents and representatives. How can the assured occupy and use the electric building except through its officers, agents and representatives?

Under Agreement IV every person, except as provided in Agreement V, is protected under the policy. No exception is made in Agreement V to employees whose salary is not the basis of a premium; therefore, the plaintiff in error is without foundation upon which

to base its contention. However, the plaintiff in error would look to another paragraph of the policy which purports to be the "Basis of Premium." This paragraph reads as follows:

> "The premium for this policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

The foregoing quoted paragraph applies to "all persons employed by the assured in the said business operations as expressed in Item 3 of the Declarations." The only persons employed by the Assured as expressed in Item 3 of the Declarations are "those engaged in the maintenance, care and upkeep of the building". The wages of those persons who are engaged in the maintenance, care and upkeep of the building should be computed as a basis of premium. But even the failure to include the salary or wages of all such persons who might be engaged in the maintenance, care and upkeep of the building, in the basis of a premium would not make ineffective the insurance in case of accidents to such employees whose salaries were omitted from the

said basis of premium, but, at the end of the policy period, the premium should be subject to adjustment by the inclusion as a basis of premium of any omitted salaries or wages.

The said Freeborough was not an employee engaged in the maintenance, care or upkeep of the electric building and for that reason the language of Condition A of said policy is wholly inapplicable, for the language of such condition covers only "persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

Again we must raise the inference under the application of the law hereinbefore quoted, that the interpretation of the policy in this particular regard is reasonably susceptible of the construction as claimed by the defendant in error, for in sustaining the demurrer to the answer the lower court adopted the interpretation claimed by the defendant in error in the following opinion:

> "This is an action, on liability insurance, for injuries sustained by an employee of plaintiff in the building and premises described and mentioned in the policy. The covering clause of the policy is as follows:
>
> "Agreement IV. This Policy covers, except as provided in Agreement V., bodily injuries, in-

cluding death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assuerd as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition."

The injury sustained was not on account of any of the excepted causes enumerated in Agreement V.

It is further provided that, "The foregoing Agreements are subject to the following conditions"; among which is Condition "A", which recites, so far as essential here:

"The premium for this Policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration * * * earned during the Policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

Further provision is made by the same condition for adjusting the premium earned at the expiration of the policy period, and for payment or repayment, as the case may be, according as the earned premium may be greater or less than the advance premium paid.

Item 3 describes the premises as "Electric Building at N. E. corner of Broadway and Alder Streets, including sidewalk surrounding same." Such also is the building in which the elevators, three in number, are situated. Item 3 contains, under the caption "Estimated Remuneration of Employees," the numerals 6000, and on the margin under the caption "Premium," the language, "Those engaged in the maintenance, care and upkeep of the building at .05 per hundred."

The injured party, although in the employ of plaintiff, was engaged as an electrician in its repair-shop, operated at a place distant about one mile from the building and premises described in the policy.

The contention of the defendant corporation, which is presented by its answer to the complaint and plaintiff's demurrer thereto, is that the injured party was not one of the persons covered by the policy; it being argued that only such employees of

the plaintiff as were engaged in the maintenance, care and upkeep of the building described in Item 3 were so covered. This depends entirely upon the proper interpretation of the provisions of the policy. There is no ambiguity which needs elucidation extrinsically as an aid to interpretation. The covering clause particularizes bodily injuries, etc., "sustained by any person or persons while within or upon the premises described in the Declarations." The language is most comprehensive—"any person or persons." That the injured party was within the premises described in the declarations when hurt is not questioned.

Condition A is intended wholly as a regulation for adjusting the premium to be paid for the issuance of the policy.

It is not doubted that the policy covers members of the general public, regardless of any employment by plaintiff. The premium for this is as expressed in Item 3. But the premium for coverage upon plaintiff's employees is based upon a different estimate, namely, the remuneration earned by all employees of plaintiff during the policy period, engaged in the business operations as expressed in such Item 3, that is to say, the maintenance, care and upkeep of the building designated, at .05 per hundred. While not all of plaintiff's

employees were engaged in the maintenance, care and upkeep of the building, Condition A does not avail to vary or modify the engagement of Agreement IV, which specifies a coverage of bodily injuries sustained by any person or persons while within or upon the premises. This plainly and obviously covers, not only the general public, but employees of plaintiff as well, whether engaged at the time in the maintenance, care and upkeep of the building or not. It is reasonable to assume that the parties considered that .05 per hundred of the entire remuneration for the policy period, of those employees so engaged was adequate as a premium for coverage upon all of plaintiff's employees, including those not so engaged. But, however that may be, Condition A treats of a different subject from that treated by Agreement V, the one relating to an adjustment of premium and the other to the persons or subjects covered by the policy of insurance. I find no ground for inference that, because the basis stipulated for ascertaining the premium which was to govern as to plaintiff's employees did not include all such employees, it was intended that none of such employees were to be embraced by the covering clause except those engaged in the maintenance, care and upkeep of the building designated. The clauses themselves are separate and distinct, and treat of separate and distinct subjects, and must be so considered. Thus

considered, the party injured, though an employee of plaintiff not engaged in the maintenance, care and upkeep of the building, was embraced by the covering clause of the policy."

Transcript of Record, 17-21.

Every reasonable interpretation of the policy must be so resolved in favor of the defendant in error; a consideration of the foregoing opinion of Judge Wolverton shows that it is not only a reasonable interpretation of the terms of the policy but that it is the only interpretation which may be logically deduced.

CONCLUSION

We contend that there is no ambiguity in the terms of the policy and that, upon a strict construction of the same, the contentions of the plaintiff in error must be overruled.

However, if the court should disagree with us in this regard, nevertheless the court must find that the interpretation demanded by the defendant in error, and found by the lower court, is reasonably susceptible from the terms of the policy, and, therefore, should be upheld under the "settled rule in the construction of a policy of insurance that whenever a policy is reasonably susceptible of two interpretations, that meaning will be given to it which is most favorable to the insured."

Conscious of the merits of its cause and appreciating the struggle of the plaintiff in error to invoke a rule of technical interpretation which is not supported by the intent of the parties, the language of the contract, or the law of the case, the defendant in error confidently submits its cause to the determination of this Court.

Respectfully submitted,

GRIFFITH, PECK & COKE,
Attorneys for Defendant in Error.

No. 4857

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND (a corporation),

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully asks for a rehearing of this case. A single consideration will, we think, demonstrate to the court that it has fallen into manifest and material error in the opinion filed herein. The point to which we refer is considered in the first subdivision of the argument which follows. In the subsequent subdivisions other features of the case will be considered, but it is obvious that if the court

has erred in respect to the first point which we make the filed opinion should be withdrawn and further consideration be given to the case.

I.

IF THE VIEWS OF THE COURT ARE CORRECT THE INSURED PAID AN ADDITIONAL PREMIUM BASED ON THE WAGES OF CERTAIN SPECIFIED EMPLOYEES WITHOUT ANY CONSIDERATION THEREFOR. ALL EMPLOYEES UNDER THE VIEWS EXPRESSED BY THE COURT WOULD HAVE BEEN COVERED BY THE TERMS OF THE POLICY REGARDLESS OF THE ENDORSEMENT COVERING SPECIFIED EMPLOYEES FOR WHICH THE INSURED PAID AN ADDITIONAL PREMIUM.

The court holds that the employer having rejected "compensation" was not "under" *the compensation law of Oregon,* and hence that *all* of its employees, whether engaged in hazardous occupations or not, were covered by the terms of the policy.

But inconsistently with this proposition it appears that the employer was charged an additional premium of five cents per hundred dollars of wages paid to its employees engaged in the maintenance, care and upkeep of the building.

Referring to this additional premium the court says that "no doubt this was intended as adequate premium to cover all of plaintiff's employees so engaged or otherwise."

But if (as the court holds) the insured's employees, as well as the public, were covered by the terms of the policy why would the insured *be charged and pay an additional premium for coverage of its employees?*

Why should the insured by an endorsement on the policy seek and pay for coverage of its employees who (as the court holds) *would be covered if such endorsement had not been made?* Why should the insured pay for what it already had? Obviously if the endorsement covering employees were eliminated from the policy the insured would have, under the court's construction of the policy, an equally broad coverage and would be relieved from the payment of an additional premium.

Aside from the considerations which follow this consideration, we respectfully submit, requires the withdrawal of the opinion filed herein. The court has here fallen into clear and unmistakable error.

A construction which involves such a marked incongruity as we have pointed out is necessarily erroneous.

II.

THERE IS NO AMBIGUITY IN THE POLICY BUT THE FORM OF IT IS GENERAL AS IT WAS PREPARED FOR USE IN ALL STATES, SOME OF WHICH HAVE COMPENSATION LAWS AND OTHERS NOT.

In the concluding paragraph of its opinion the court refers to the well-established rule that ambiguities in insurance policies should be resolved in favor of the insured.

But there is no ambiguity in the policy here. In the clearest and most definite terms the policy excludes employees in states where there is a "Compensation Act or Law". There is no ambiguity or uncertainty in this

language. Of course if the policy had been prepared for the plaintiff alone, or for that matter for the State of Oregon alone, it is probable that different language would have been used. But bearing in mind that employers' liability policies are *printed contracts intended for general use throughout the country,* we do not see how the insurer could possibly have better expressed its intent than it did by the language which it employed in this case. It meant to say, and did say, that in states which have compensation laws employees are not covered *unless they are expressly stated to be covered, and liability assumed by the employer for an additional premium based on the remuneration paid to employees.* If the insurer had been making a contract *with the plaintiff only* it would no doubt have provided that the policy covered the public, and such employees of the insured as were engaged in non-hazardous occupations; and also (in consideration of the *additional* premium) such employees as were engaged in the maintenance, care and upkeep of the building. But while such a contract would have been perhaps more pointed and direct, it would not have been any *clearer* or *more definite* than the policy in suit. The difference lies in the fact that the form of the policy used in this case is applicable to all insured persons in whatever state they may be.

It was so phrased as to include *all cases* instead of *one particular case.* It would be most unreasonable, we submit, to require an insurer to abandon the form of policy used by it throughout the United States and oblige it to draw up a *special contract for each person insured.* This would involve a considerable increase

of expense without any material advantage to either the insurer or insured.

It seems incredible that the insured in this case could have supposed, by reason of anything in the policy issued to it, that the policy covered *all* of its employees engaged in hazardous occupations. The policy distinctly specified not that *all,* but that *some only,* of plaintiff's employees were covered; and it *specifically named those who were covered.* And the premium paid was based not on the wages of *all* employees engaged in hazardous occupations *but only on the wages paid to the specified employees.*

Nor could the insured for a moment have entertained the belief that *all* of its employees were covered because it had rejected "compensation". If it had believed this, most certainly *it would not have paid the additional premium on the wages of the specified employees.* It would have taken the policy without any reference therein to such employees because (if the court's construction of the policy be correct) such specified employees and *all other employees* were covered by the terms of the policy. If none of the employees, as the court holds, were "under" the "compensation" law the insured would not have paid an additional premium in order that they or any of them might be included. No sane man would pay a premium to include employees *who already were covered by the terms of his policy.*

III.

THE EMPLOYER AND ITS EMPLOYEES ENGAGED IN HAZARDOUS OCCUPATIONS WERE UNDER THE SO-CALLED "COMPENSATION" LAW OF OREGON.

We find in the opinion of the court no answer to our argument on this point. The court merely says that it "cannot agree" with our "contention".

The cases which the court cites in its opinion are plainly irrelevant. They have no bearing upon the point here involved. They do not hold, nor remotely intimate, that an employer is not under the "compensation" *law* because he is willing to be stripped of his common law defenses rather than pay "compensation."

No such point was involved nor considered in the cases cited by the court in its opinion. In these cases the court was not considering the question whether or not the employer was "under" the "compensation" *law*. It was there pointed out that the employer was not *legally bound to pay "compensation"*—that in lieu thereof he could pay *damages* if he so chose. In other words, he had the right to elect to assume *damage liability* which the statute imposed upon him if he were not willing to accept *compensation liability*. In either case the employer would of course be *"under" the compensation law*. The cited cases give no support whatever to the conclusion reached by the court in this case. On the other hand, we cited a number of cases which, we submit, clearly support our contention that in any event the employer was *"under" the law;* to which cases no reference is made in the court's opinion. These cases are to the effect that whether the em-

ployer elects to pay "compensation" or to pay *damages* he is still *subject to the law.* He is as much "under" the compensation *law* as he is under the law of gravity. Oregon employers can no more "reject" the "compensation" law of that state than they can "reject" the law of gravity. They can of course, if they choose to do so, jump out of the frying pan into the fire; but in either case their position will be such an uncomfortable one that, *without an additional premium,* insurers will not accept the risk.

The purpose of the legislature in enacting the compensation law was to *induce* employers to pay their employers "compensation", but it did not *legally obligate* them to do so. It said to employers, "you must either pay compensation *or take the consequences";* and unless, in the judgment of the legislature, the consequences were more onerous than the payment of compensation the law would not have been passed. It would of course be futile for the legislature to have said to employers: "pay compensation if you want to, but if you prefer you can assume a *less onerous* obligation". Obviously in such case no employer would pay compensation. He pays it because he considers his risk *less if he pays compensation than if he elects not to pay it.* It is because of this fact that the law accomplishes generally what the legislature was seeking to accomplish—the payment of compensation. Here and there an employer, putting his judgment against the judgment of the legislature, as was done by the employer in the case at bar, decides to run the risk attaching to an election not to pay compensation.

From the point of view *of an insurer* it is of course immaterial that the employer has elected not to pay "compensation". The exception in the policy is not aimed at "compensation" but at the so-called "compensation" *law*. The insurer is concerned with the *nature of the risk assumed*. If, as we must presume, the *damage risk* is worse, or at least as bad, as the "compensation" risk, the insurer will of course decline to assume the *damage risk* without the payment of an additional premium, for the same reason that it would decline to accept the *"compensation" risk*. In the case at bar the insured actually paid an additional premium for certain employees specifically covered by the terms of the policy. It is, we submit, preposterous to assume that this additional premium would have been paid by the employer if, as the court holds, the exception in the policy was intended to relate to employees entitled to compensation and not to employees entitled to damages. *None* of the insured's employees were entitled to compensation; they were *all* entitled to damages. Now if there was no objection on the part of the insurer to covering employees entitled to damages why was an *additional charge* made for the included employees, and why did the employer pay such charge? Why charge an additional premium for employees which the policy, as construed by the court, covered without the payment of such additional premium? According to the view entertained by the court the case is the same as if *no compensation law had been enacted in Oregon*. In such case, of course, by the express terms of the policy, employees as well as the public would be covered *without any charge on*

account of employees. The policy covers all "persons" which of course would include employees in states where compensation laws have not been enacted. In such states the risk is less. Compensation laws, whether "optional" or not, impose *additional burdens* on the employer and of course *increase the risk assumed by an insurer.* This is the explanation of the exception in the policy excluding from its operation (without the payment of an additional premium) "any employee of the assured under any Workmen's Compensation Act or Law". As above stated, the policy is a *general form prepared for use in all states.* Where compensation laws have been enacted employers are not covered except by *special agreement endorsed on the policy* and an additional charge made for such coverage as provided in Item 3 of the Declarations, to-wit, a charge based on the remuneration paid the employees the risk as to whom the insurer agrees to assume. The exception relates to conditions existing in the State of Oregon as well as in states where no election is provided for as between "compensation" and damage liability. There *is* in Oregon a "Compensation Act or Law" just as well as in the State of California. The form of policy used in this case is as applicable to exclude employees engaged in hazardous occupations in the State of Oregon, election or no election, as it is to exclude employees in the State of California. The optional feature, *so far as the risk is concerned,* is wholly immaterial.

IV.

THE PREMIUM OF FIVE CENTS PER HUNDRED DOLLARS ON THE WAGES OF THE EMPLOYEES ENGAGED IN THE MAINTENANCE, CARE AND UPKEEP OF THE BUILDING IS THE CONSIDERATION FOR THE INSURANCE WITH RESPECT TO SUCH EMPLOYEES AND TO NO OTHERS.

On this point the court says in its opinion: "it is clear that all of plaintiff's employees are not engaged in the maintenance, care and upkeep of the building, and no doubt this was intended as adequate premium to cover all of plaintiff's employees so engaged or otherwise". But why this should be so the court does not explain. We submit that it is manifestly not so. A premium is of course *adjusted to the risk assumed.* It is a percentage on the wages paid. The more employees, the larger the premium. The aggregate wages paid to the employees engaged in the maintenance, care and upkeep of the building was estimated at only $6000.00 per year. How could this small premium based on the wages paid *some* employees be an "adequate premium" for *all* employees? It was of course not a consideration for employees engaged in non-hazardous occupations because they were covered anyhow. And it is incomprehensible to us how it could be the consideration "to cover all of plaintiff's employees" engaged in hazardous occupations of which there were a very large number. It certainly will not be questioned *that premiums are proportionate to risks.* Now suppose that plaintiff the day following the issuance of the policy engaged a thousand new employees and put them to work in hazardous occupations other than in the maintenance, care and upkeep of the building. Upon what rational theory can it be said that

this small *inelastic* premium was intended to embrace such additional employees? Or suppose that plaintiff *reduced* the number of employees engaged in the maintenance, care and upkeep of the building so that their wages were but $3000.00 instead of $6000.00. Why should the *reduced premium* cover all *other* employees including employees engaged *after the policy was written?* Certainly we have here a manifest and gross incongruity which conclusively demonstrates that the court has fallen into error in holding that "no doubt this was intended as adequate premium to cover all of plaintiff's employees so engaged or otherwise".

But if, as the court says, *"any person or persons"* are covered by the terms of the policy then of course all employees would be covered without the payment of an additional premium based on the wages paid employees. If *employees,* as the court holds, are to be treated as embraced by *"any person or persons"* why should an additional premium be paid for their coverage?

It is plain, we submit, that the provision of the policy relating to the payment of premium based on wages paid employees relates to those cases *where compensation laws are in effect,* and hence where employees would be *excluded* by the exception in the policy unless they are *included* by special endorsement on the policy and an *additional charge made for including them.*

It follows that the provision regarding the payment of a premium based on wages paid employees *can be* "invoked" as evidence against the construction given by the court. This provision *coupled with the actual*

payment of a premium under it conclusively demonstrates that the employees engaged in the maintenance, care and upkeep of the building would not have been covered if they had not been *named in the policy and a premium paid for assuming the risk as to them.*

If the insured desired other employees engaged in hazardous occupations covered it should and would have paid for such coverage a premium *based on the wages paid such other employees.*

Doubtless the reason why the insured did not have such *other employees* covered was that the risk of injury *by the elevator* as to them was somewhat remote, and so the insured rather than pay the premium required for such coverage assumed the risk as to such *other employees* itself. As it is, no consideration as to them was received by the insurer. The insured in this case prayed that it be given something for nothing and its prayer was granted.

For these reasons we most earnestly urge upon the court that it grant a rehearing and rectify the manifest injustice done by the judgment in this case.

Dated, November 29, 1926.

Respectfully submitted,

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
REDMAN & ALEXANDER,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, November 29, 1926.

L. A. REDMAN,
Of Counsel for Plaintiff in Error and Petitioner.

No. 4859

United States
Circuit Court of Appeals
For the Ninth Circuit.

GRAVER CORPORATION, a Corporation,
Plaintiff-in-Error,

vs.

HERCULES GASOLINE COMPANY, a Corporation,
Defendant-in-Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
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Transcript of Record.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiff-in-Error:

WILBUR BASSETT, Esq., Van Nuys Building.
CARROLL ALLEN, Esq., Stock Exchange Building, Los Angeles, California.

For Defendant-in-Error:

McCOMB & HALL, Esqs., Bank of Italy Building, Los Angeles, California.

United States of America, ss.

To HERCULES GASOLINE CO., a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 6th day of May, A. D. 1926, pursuant to writ of error in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action at law entitled Hercules Gasoline Co., a corporation, plaintiff vs. Graver Corporation, defendant, and you are directed to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. P. JAMES United States District Judge for the Southern District of California, this 7th day of April, A. D. 1926, and of the Independence of the United States, the one hundred and fiftieth

Wm P James
U. S. District Judge for the Southern District of California.

[Endorsed]: No. 1735-B-Law In the United States Circuit Court of Appeals for the Ninth Circuit Hercules Gasoline Co. vs. Graver Corporation Citation Received copy of the within citation this 8th day of

April, 1926. McComb & Hall, attorneys for plaintiff and respondent in error. Filed Apr. 12, 1926 Chas. N. Williams, Clerk, by L. J. Cordes deputy clerk.

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between Hercules Gasoline Co., a corporation, plaintiff, vs. Graver Corporation, defendant, a manifest error hath happened, to the great damage of the said Graver Corporation as by its complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 6th day of May next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit

Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM HOWARD TAFT, Chief Justice of the United States, this 7th day of April in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the United States the one hundred and fiftieth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By R S Zimmerman
Deputy Clerk.

The above writ of error is hereby allowed.

Wm P James
Judge.

I hereby certify that a copy of the within Writ of Error was on the 7th day of April, 1926, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

[Seal] Chas. N. Williams,
Clerk of the District Court of the United States for the Southern District of California.
By L. J. Cordes
Deputy Clerk.

[Endorsed]: No. 1735-B-Law United States Circuit Court of Appeals for the Ninth Circuit Hercules Gasoline Co. Plaintiff in Error vs. Graver Corporation Defendant in Error Writ of Error Filed Apr. 7, 1926. Chas N. Williams, clerk, by L. J. Cordes, deputy clerk.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs GRAVER CORPORATION, a corporation, Defendant,	COMPLAINT (For Money)

Plaintiff complains of defendant and for cause of action alleges:

I.

That plaintiff is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California; that defendant is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business within the State of California;

II.

That on or about February 7, 1924, plaintiff and defendant entered into a certain agreement in writing wherein and whereby defendant agreed by and with plaintiff that upon plaintiff producing due evidence of its having acquired title to a certain steel tank, described as Graver Tank No. 2, defendant would ship promptly as directed, and not later than August 1, 1924, steel products to be ordered by plaintiff of the aggregate price of thirty-six thousand dollars ($36,000.00) at prices prevailing at date of shipment, which plaintiff agreed to accept and pay for at said price, and defendant agreed to accept in part payment and exchange for said steel products said Graver Tank No. 2 at the agreed price of twenty-seven thousand dollars ($27,000.00) and credit plaintiff said sum of twenty-seven thousand dollars ($27,000.00) upon the aggregate purchase price of said steel products, and defendant further agreed that said steel products would be erected by or at its direction in or near Los Angeles at the prevailing price for this class of work;

III.

That on or about April 4, 1924, and prior to the furnishing of any of said steel products by defendant, and despite the fact that plaintiff had theretofore produced due evidence of its having acquired title to said Graver Tank No. 2, and was ready and willing to perform each and all of the terms and conditions of said agreement upon its part to be performed, defendant stated to plaintiff that it would not receive or accept

said Graver Tank No. 2 in part payment or in exchange for said steel products or allow plaintiff said credit of twenty-seven thousand dollars ($27,000.00) therefor in part payment of said steel products, and refused to furnish said steel products upon the terms stated in said agreement, and repudiated and refused to abide by or perform said agreement, all to plaintiff's damage in the sum of nineteen thousand two hundred dollars ($19,200.00);

WHEREFORE, plaintiff prays judgment against defendant in the sum of nineteen thousand two hundred dollars ($19,200.00) with interest thereon from the date of the filing of this complaint and for plaintiff's costs, and for such other and further relief as may be meet and proper.

McCOMB & HALL,
Attorneys for Plaintiff

State of California, County of Los Angeles—ss.

C. R. BIRD being duly sworn says: That he is General Superintendent of Hercules Gasoline Company, plaintiff in the foregoing entitled matter that he has read the foregoing COMPLAINT and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true; that he makes this verification for and on behalf of said corporation.

C. R. BIRD

General Superintendent Hercules Gasoline Company

Subscribed and sworn to before me this 28th day of April 1924

[Seal] T. W. MASON

Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 14, 1928.

(ENDORSED): FILED APR 28 1924 423 P M L E LAMPTON, County Clerk By Roy Goff Deputy

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs. GRAVER CORPORATION, a corporation, Defendant.	No. 142550. ORDER FOR REMOVAL.

[F. C. C. Judge] on the 12th day of May, 1924,

This cause coming on for hearing upon petition and bond of defendant for an order transferring this cause to the United States District Court, for the Southern District of California, Southern Division, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond, with good

and suffiicent surety, as provided by law, and that defendant has given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removing to said District Court,

NOW THEREFORE, said petition and bond are hereby accepted, and IT IS HEREBY ORDERED AND ADJUDGED that this cause be, and it is hereby, removed to the United States District Court, for the Southern District of California, Southern Division, and the Clerk is hereby directed to make up the record of said case for transmission to said Court forthwith.

Done in open court this 16 day of May, 1924.

FRANK C. COLLIER Judge.

STATE OF CALIFORNIA }
County of Los Angeles } ss

No. 142550

I, L. E. LAMPTON, County Clerk and ex-officio Clerk of the Superior Court do hereby certify the foregoing to be a full, true and correct copy of the original Complaint (For Money), Petition for Removal, Notice of Petition and Bond for Order of Removal, Minute Order Granting Petition for Removal and Order for Removal—HERCULES GASOLINE COMPANY, a corp., -vs- GRAVER CORPORATION, a corporation, on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand

and affixed the seal of the Superior Court this 20th day of May, 1924.

L. E. LAMPTON, County Clerk
By D. M. Forbes,
[Seal] Deputy Clerk

(ENDORSED) FILED MAY 16, 1924. L. E. LAMPTON, County Clerk, By Rugby Ross Deputy

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, -vs- GRAVER CORPORATION, a corporation, Defendant.	)	No. 1735-B. DEMURRER.

Comes now the defendant herein and demurs to the complaint and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this: that it does not appear therefrom how or in what manner plaintiff

has sustained any damages in the sum of $19,200.00 or any amount.

III.

That said complaint is uncertain in this: that it does not appear from said complaint that the plaintiff could not, upon the breach of said contract, have purchased the equivalent of said steel and other products in this market at a price not in excess of the price or consideration agreed to be paid by plaintiff to defendant.

WHEREFORE DEFENDANT PRAYS: that plaintiff take nothing and that it recover its costs.

Carroll Allen

Atty for Deft

I hereby certify that in my opinion the foregoing demurrer is well founded in law and that the same is not interposed for delay.

Carroll Allen

Attorney for defendant.

[Endorsed]: No. 1735 Dept B. In the District Court of the United States, Southern District of California, Southern Division. Hercules Gasoline Company, a corporation, plaintiff, vs Graver Corporation, a corporation, defendant. Demurrer. Received copy of the within Demurrer this 14 day of June, 1924. McComb & Hall, Attorney for plaintiff. Filed Jun 16, 1924. Chas N. Williams, Clerk by Edmund L. Smith, Deputy Clerk. Carroll Allen Attorney at Law Stock Exchange Building Los Angeles, Cal.

At a stated term, to wit: the January, A. D. 1924 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the thirtieth day of June in the year of our Lord one thousand nine hundred and twenty-four.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

Hercules Gasoline Company, a corporation, Plaintiff	)	
vs.	)	No. 1735-B. Civ.
Graver Corporation Defendant.	)	

This cause coming before the court at this time for hearing on Demurrer; Attorney McComb of Messrs. McComb & Hall appearing as counsel for the plaintiff, pursuant to consent of counsel for the respective parties, it is by the court ordered that the said demurrer be and the same is hereby overruled and that the defendant Graver Corporation have twenty days to answer the bill of complaint of said Hercules Gasoline Company, a corporation.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs. GRAVER CORPORATION, a corporation, Defendant.	No. 1735-B. ANSWER

Comes now the defendant GRAVER CORPORATION, a corporation, and for answer to the complaint alleges:

I.

Defendant denies that during any or all of the times mentioned in the complaint, it was, or is now, doing business within the State of California.

II.

Defendant denies that on February 7, 1924, or at any time, plaintiff and defendant entered into a contract and agreement in writing, wherein and whereby defedant agreed by and with plaintiff that, upon plaintiff's producing due evidence of its having acquired title to a certain steel tank, described as Graver Tank No. 2, defendant would ship promptly as directed, and not later than August 1, 1924, steel products to be

ordered by plaintiff of the aggregate price of $36,-000.00 at prices prevailing at date of shipment, which plaintiff agreed to accept and pay for at said or any price, and denies that defendant agreed thereby or at all to accept in part payment and exchange for said steel products said Graver Tank No. 2 at the agreed price of $27,000.00 and credit plaintiff with said sum of $27,000.00 upon the aggregate purchase price of said steel products, and denies that defendant further agreed thereby or at all that said steel products would be erected by or at its direction in or near Los Angeles, California, at the prevailing price for that class of work.

III.

Defendant alleges that on or about said date, one S. Reid Holland, without authority of defendant, executed a purported agreement on behalf of defendant, by which defendant was obligated to carry out said contracts according to the terms set forth in the complaint. That said Holland at said date did not have any authority or right to execute said contract for and on behalf of defendant, and that defendant never at any time ratified or confirmed the same. That said purported contract was on or about February 7, 1924, sent from Los Angeles to defendant at its office and principal place of business at East Chicago, Indiana. That defendant refused to ratify, accept or be bound by said alleged contract, and so notified plaintiff. That on March 5, 1924, plaintiff by telegram requested defendant to give the matter of said alleged contract its

attention; otherwise, plaintiff would place the said order elsewhere and cancel the entire deal. That after the receipt of said telegram, defendant advised plaintiff that it would not be bound by said alleged contract, and that it would not fulfill same.

IV.

Defendant denies that on or about April 4, 1924, or at any time, or at all, plaintiff produced or submitted due or any evidence of its having acquired title to said Graver Tank No. 2. Defendant admits that, as hereinbefore alleged, it advised plaintiff that it would not fulfill said alleged contract or credit plaintiff with $27,000.00 thereon on account of said Graver Tank No. 2, and admits that it refused to furnish said steel products upon the terms stated in said alleged agreement, but denies that plaintiff has sustained any damages in the sum of $19,200.00, or any amount on said or any account.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that it recover its costs herein.

Carroll Allen
Attorney for Defendant.

STATE OF CALIFORNIA, } ss.
County of Los Angeles. }

CARROLL ALLEN, being by me first duty sworn, deposes and says: that he is the attorney for defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as

to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That affiant makes this affidavit on behalf of defendant for the reason that defendant is a foreign corporation and none of its officers are within the County of Los Angeles, State of California.

Carroll Allen.

Subscribed and sworn to before me this 16th day of August, 1924

[Seal] M. E. Davis

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 1735-B. In the District Court of the State of California Southern Division. Hercules Gasoline Company plaintiff vs. Graver Corporation, defendant. Answer. Received copy of the within Answer this 18 day of August, 1924. McComb & Hall Attorney for plaintiff. Filed August 19—1924 Chas. N. Williams Clerk R S Zimmerman Deputy. Carroll Allen attorney at law Stock Exchange Building Los Angeles Cal. 875-777. Attorney for defendant

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

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HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs. GRAVER CORPORATION, a corporation, Defendant.	DEMAND FOR BILL OF PARTICULARS.

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TO THE PLAINTIFF ABOVE NAMED, AND TO MESSRS. McCOMB & HALL, ITS ATTORNEYS:

Defendant, Graver Corporation herein, hereby demands of you a bill of particulars and copy of the account sued and declared upon in the complaint herein.

DATED: September 18, 1925.

Carrol Allen
Wilbur Bassett
Attorneys for Defendant.

[Endorsed]: No. 1735-B. In the District Court of the United States, Southern District of California, Southern Division. Hercules Gasoline Company, a corporation, Plaintiff vs. Graver Corporation, a corporation, Defendant Demand for Bill of Particulars

Received copy of the within Bill this 18th day of Sept. 1925 McComb & Hall Attorney for plaintiff. Filed Oct 13 1925 Chas. N. Williams, Clerk By R. S. Zimmerman Deputy Clerk. Wilbur Bassett 432 Van Nuys Building Los Angeles Attorney for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs. GRAVER CORPORATION, a corporation, Defendant.	BILL OF PARTICULARS.

To GRAVER CORPORATION, a corporation, and to CARROLL ALLEN, Esq., and WILBUR BASSETT, Esq., its attorneys:

In compliance with your demand therefor, plaintiff in the above entitled action hereby serves upon you its Bill of Particulars of its claim set forth in its complaint herein:

The sum of $15,000.00, being the excess of the amount due from defendant on account of said Graver Tank No. 2 under the contract alleged in the complaint over the price which plaintiff could have ob-

tained therefor in the market nearest to the place at which it should have been accepted by the defendant and at such time after the breach of the contract as would have sufficed with reasonable diligence for the plaintiff to affect a resale.

The sum of $4,200.00 on account of expenses incurred by plaintiff in repairing certain stills, tanks and other equipment and other detriment proximately caused by the breach of defendant's obligations set forth in plaintiff's complaint.

Plaintiff in furnishing this Bill of Particulars reserves the right to hereafter contend that it should not be bound thereby on the ground that no Bill of Particulars may be properly and lawfully demanded in this action.

Dated: September 23, 1925

McComb & Hall

Attorneys for Plaintiff.

[Endorsed]: Original No. 1735-B Civil. In the District Court of the United States, Southern District of California.....Division. Hercules Gasoline Company, a corporation, Plaintiff, vs. Graver Corporation, a corporation, Defendant. Bill of Particulars. Received copy of the within Bill this 23 day of Sept 1925 Carroll Allen, Wilbur Bassett Attorneys for Defdt. Filed Oct 13 1925 Chas. N. Williams, clerk by R. S. Zimmerman deputy clerk McComb & Hall Attorneys at Law 1014-15-16 Bank of Italy Bldg. Seventh & Olive Streets Los Angeles, Calif. Phone 821459 Attorneys for Plaintiff.

At a stated term, to wit: The January Term, A. D. 1926 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 25th day of January, in the year of Our Lord one thousand nine hundred and twenty-six.

Present:

The Honorable Edward J. Henning, District Judge.

Hercules Gasoline Company, a corporation, Plaintiff, vs. Graver Corporation, Defendant.	No. 1735-B Law.

This cause coming before the court for hearing on motion of defendant to vacate judgment and for new trial; Attorney McComb appearing for the plaintiff, and Wilbur Bassett, Esq., appearing for the defendant; said Wilbur Bassett, Esq., argues in behalf of the defendant; now, it is by the court ordered that the motion of defendant to vacate judgment and for new trial be denied.

At a stated term, towit: the July, A. D., 1925 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the sixteenth day of October, in the year of our Lord, one thousand nine hundred and twenty-five;

Present: The Honorable Edward J. Henning, District Judge.

Hercules Gasoline Company, Plaintiff,	)	
vs.	)	No. 1735-B. Law.
Graver Corporation, Defendant.	)	

This cause coming before the court for further trial without a jury, a jury trial having been waived; * * *

At the hour of 12:05 o'clock p. m., the court renders its oral opinion finding in favor of the plaintiff Hercules Gasoline Company and orders the plaintiff to prepare Findings of Fact and Conclusions of Law in accordance therewith; and

* * * * * * * * *

At the hour of 12:25 o'clock p. m., this cause is taken under advisement on the measure of damages upon briefs to be filed, plaintiff to file its brief within ten days and the defendant to have ten days to reply thereto.

At a stated term, to wit: The July Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 16th day of November, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable Edward J. Henning, District Judge.

Hercules Gasoline Company, a corporation, Plaintiff, vs. Graver Corporation, Defendant.	No. 1735-B Law.

On the trial of this cause, the court found for the plaintiff but asked for briefs on the question of damages. The court finds that the plaintiff is entitled to its full claim on the first claim, to wit: $15,000.00, the difference between the agreed sale price and what was received by selling the tank. As to the second claim, based upon repairs made necessary by breach of contract, in the amount of $4,100.00, the court disallows this entirely and finds for the defendant on this claim. The general finding being for the plaintiff, the attorneys for the plaintiff are directed to prepare findings accordingly.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs GRAVER CORPORATION, a corporation, Defendant.	No. 1735-B Civil FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial in the above entitled court on October 15, 1925, before the Hon.

Edward J. Henning, Judge of said court, sitting without a jury, a jury having been expressly waived by the parties. Plaintiff appeared by its attorneys, Marshall F. McComb, Esq., and John M. Hall, Esq., of the firm of McComb & Hall. Defendant appeared by its attorneys, Carroll Allen, Esq., and Wilbur Bassett, Esq. Evidence, both oral and documentary, having been introduced by plaintiff and defendant, and the evidence being closed, and both sides resting, and the cause having been submitted to the court for decision, and having been taken under advisement by the court; now, therefore, after consideration and deliberation, the court does make the following its findings of fact, and conclusions of law:

FINDINGS OF FACT.

The court makes the following findings of fact, to-wit:

I.

That it is true that plaintiff is, and at all times mentioned in the complaint herein was a corporation organized and existing under and by virtue of the laws of the State of California; that defendant is, and at all times mentioned in the complaint herein was a corporation organized and existing under and by virtue of the laws of the State of Illinois, and doing business within the State of California;

II.

That it is true that on or about February 7, 1924, plaintiff and defendant entered into a certain agreement in writing wherein and whereby defendant

agreed by and with plaintiff that upon plaintiff's producing due evidence of its having acquired title to a certain steel tank, described as Graver Tank No. 2, defendant would ship promptly as directed, and not later than August 1, 1924, steel products to be ordered by plaintiff, of the aggregate price of $36,000.00, at prices prevailing at date of shipment, which plaintiff agreed to accept and pay for at said price, and defendant agreed to accept in part payment and exchange for said steel products said Graver Tank No. 2, at the agreed price of $27,000.00, and credit plaintiff said sum of $27,000.00 upon the aggregate purchase price of said steel products, and defendant further agreed that said steel products would be erected by or at its direction in or near Los Angeles, at the prevailing price for this class of work;

III.

That it is true that on or about April 4, 1924, and prior to the furnishing of any of said steel products by defendant, and despite the fact that plaintiff had theretofore produced due evidence of its having acquired title to said Graver Tank No. 2, and was ready and willing to perform each and all of the terms and conditions of said agreement upon its part to be performed, defendant stated to plaintiff that it would not receive or accept said Graver Tank No. 2 in part payment or in exchange for said steel products, or allow plaintiff said credit of $27,000.00 therefor in part payment of said steel products, and refused to furnish said steel products upon the terms stated in

said agreement, and repudiated and refused to abide by or perform said agreement;

IV.

That it is true that by reason of the foregoing, plaintiff has been damaged in the sum of $15,000.00, of which amount the sum of $15,000.00 are damages on account of the excess of the amount due from defendant on account of said Graver Tank No. 2 under said contract, over the price which plaintiff could have obtained therefor in the market nearest to the place at which it should have been accepted by the defendant, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for plaintiff to effect a re-sale, and of which amount the sum of $0.00 are damages on account of expenses incurred by plaintiff in repairing certain stills, tanks and other equipment rendered necessary by the breach of defendant's obligations under said contract;

V.

That it is true that one S. Reid Holland executed the agreement heretofore referred to in Paragraph II of these findings on behalf of defendant, but it is not true that said S. Reid Holland executed said agreement without authority of defendant, or that said Holland at said date did not have authority or right to execute said agreement for or on behalf of defendant, or that defendant never at any time ratified or confirmed the same; that it is true that said agreement was on or about February 7, 1924, sent from Los Angeles to defendant at its office and principal place

of business at East Chicago, Indiana; that it is not true that defendant refused to ratify, accept or be bound by said agreement prior to on or about April 4, 1924, or that defendant notified plaintiff that it refused to ratify, accept or be bound by said agreement prior to on or about April 4, 1924.

From the foregoing findings of fact the court makes the following conclusions of law:

CONCLUSIONS OF LAW.

I.

That on or about February 7, 1924, plaintiff and defendant entered into an agreement containing the terms and conditions more particularly set forth in plaintiff's complaint herein, and in the above findings;

II.

That plaintiff at all times prior to defendant's repudiation of said agreement, on or about April 4, 1924, had performed each and all of the terms and conditions of said agreement upon its part to be performed; and was at the date of said repudiation ready and willing to thereafter perform each and all of the terms and conditions of said agreement upon its part to be performed;

III.

That said agreement was repudiated and breached by defendant on or about April 4, 1924.

IV.

That plaintiff is entitled to recover judgment against defendant in the sum of $15,000.00, together with plaintiff's costs herein.

Judgment is hereby ordered to be entered accordingly.

Dated: November 21, 1925.

Edward J. Henning
JUDGE.

[Endorsed]: Original No. 1735-B In the District Court of the United States, Southern District of California, Southern Division. Hercules Gasoline Company, a corporation, Plaintiff. vs. Graver Corporation, a corporation, Defendant. Findings of Fact and Conclusions of Law Received copy of the within Findings this 13 day of Nov. 1925 Wilbur Bassett Carroll Allen Attorneys for Deft Filed Nov 21 1925. Chas. N. Williams, Clerk By Murray E. Wire Deputy Clerk. McComb & Hall Attorneys at Law 1014-15-16 Bank of Italy Bldg. Seventh & Olive Streets Los Angeles, Calif. Phone 821459 Attorneys for Plaintiff

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs GRAVER CORPORATION, a corporation, Defendant.	No. 1735-B Civil JUDGMENT

This cause came on regularly for trial in the above entitled court on October 15, 1925, before the Hon

Edward J. Henning, Judge of said court, sitting without a jury, a jury having been expressly waived by the parties. Plaintiff appeared by its attorneys, Marshall F. McComb, Esq., and John M. Hall, Esq., of the firm of McComb & Hall. Defendant appeared by its attorneys, Carroll Allen, Esq., and Wilbur Bassett, Esq. Evidence both oral and documentary, having been introduced by plaintiff and defendant, and the evidence being closed, and both sides resting, and the cause having been submitted to the court for decision, and having been taken under advisement by the court; and the court after consideration of the case having heretofore made its written findings of fact and conclusions of law;

NOW, THEREFORE, pursuant thereto, IT IS ORDERED, ADJUDGED AND DECREED: That plaintiff do have and recover of and from defendant the sum of $15,000.00, together with plaintiff's costs and disbursements incurred herein, taxed in the sum of $54.55.

Dated: November 21st, 1925.

Edward J. Henning

JUDGE

JUDGMENT ENTERED NOVEMBER 21ST, 1925 CHAS. N. WILLIAMS clerk, by Murray E. Wire deputy clerk

[Endorsed]: Original No. 1735-B In the District Court of the United States, Southern District of California, Southern Division. Hercules Gasoline Company, a corporation, Plaintiff. vs. Graver Corpo-

ration, a corporation, Defendant. Judgment Received copy of the within Judgment this 13 day of Nov. 1925 Wilbur Bassett Carroll Allen Attorneys for deft Filed Nov 21 1925 Chas. N. Williams, Clerk. By Murray E Wire, Deputy Clerk McComb & Hall Attorneys at Law 1014-15-16 Bank of Italy Bldg. Seventh & Olive Streets Los Angeles, Calif. Phone 821459 Attorneys for Plaintiff

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

HERCULTES GASOLINE CO., a corporation, Plaintiff, vs. GRAVER CORPORATION, Defendant.	MOTION FOR NEW TRIAL AND NOTICE

TO HERCULES GASOLINE COMPANY, Plaintiff and to MESSRS. MC COMB AND HALL, Its Attorneys:

Now comes defendant and moves the Court to vacate the judgment heretofore entered herein in favor of plaintiff and to grant a new trial of said cause for the following causes, materially affecting the substantial rights of the defendant herein, to-wit:

1. Irregularity of the proceedings of the court and of the plaintiff, and orders of the court and abuses of discretion by which defendant was prevented from having a fair trial.

2. Accident or surprise which ordinary prudence could not have guarded against.

3. Insufficiency of the evidence to justify the findings and decision of the court and that the said findings and decision are against law.

4. Error in law occurring at the trial and excepted to by defendant.

Said motion is based upon the files and orders herein and upon the minutes of the court.

You will please take notice that defendant will appear before Hon. Edward J. Henning, one of the Judges of said court in his court room in the Federal Building in the City of Los Angeles, California, on Monday, the 4th day of January, 1926, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, and then and there move the court to grant the motion hereinbefore set out and to vacate the said judgment and grant a new trial of said cause for the causes and upon the grounds hereinbefore set out.

Caroll Allen
Wilbur Bassett
Attorneys for Defendant.

[Endorsed]: Original. No. 1735-B. In the District Court of the United States In and for the Southern District of California, Southern Division Hercules Gasoline Co. plaintiff, vs. Graver Corpora-

tion, defendant. Motion for New Trial and Notice. Received copy of the within Motion & Notice this 28th day of Dec. 1925. McComb & Hall attorneys for plaintiff. Filed Dec 28 1925. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Wilbur Bassett, 432 Van Nuys Building Los Angeles Attorney for defendant

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HERCULES GASOLINE CO., a corporation,

Plaintiff,

vs.

GRAVER CORPORATION,

Defendant.

No. 1735-B Law.

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that this case came on regularly to be heard the 15th day of October, 1925; Hon. Edward J. Henning, Judge presiding; Messrs. McComb & Hall appearing as attorneys for the plaintiff and Messrs. Carroll Allen and Wilbur Bassett appearing as attorneys for the defendant.

(Testimony of Arthur A. Butler.)

The following evidence was introduced by the plaintiff from the deposition of

ARTHUR A. BUTLER,

a witness called on behalf of said plaintiff:

"My name is Arthur A. Butler; I reside in Hammond, Indiana; I have been connected with Graver Corporation about 13 years as manager of tank sales, which position I held in 1923 and 1924. I at various times consulted with various officers of Graver Corporation."

Plaintiff introduced Defendant's Exhibit 6 attached to the deposition (after same was identified), as follows:

EXHIBIT 6.

February 11th, 1924.
(Dictated February 9th)

Mr. S. Reid Holland,
819 Stock Exchange Bldg.,
Los Angeles, California.
A. A. Butler

In explanation of the various wires that have been sent you, I beg to give you the following explanation:

Before proceeding I wish to advise that this matter has been analyzed in detail to Mr. P. S. Graver personally, who stated that he advised you that any arrangement he made with you personally while on his trip to your city was subject to detailed arrangements that would be made with you by the Sales Depart-

(Testimony of Arthur A. Butler.)

ment at this end. It was my intention sometime ago to write up a contract under which you were to operate, but did not feel, in view of the short space of time that we were known to each other, that we should enter into any arrangement until we were better known to each other, which is one that I have been following out in all of my sales plans.

Regarding the Getty proposition; as explained in Mr. Phillips' wire of late January, we had at no time based our figures on any other plans, but that $580.00 per tank was the commisssion and that $750.00 per tank was your split on the erection. In view of that fact, therefore, as advised in that wire, your account had been credited with the amount of $580.00 on the first tank, plus the full split on the erection, but in view of the fact that only $18,000.00 had been received on the second tank only one-half of the commission should have been credited to your account. As mentioned in Mr. Phillips' wire a sum in excess of this had already been credited and we, therefore, did not see the justice in your request asking for additional commissions.

As stated in Mr. P. S. Graver's wire of several days ago and in my Night letter of yesterday, further commissions will, therefore, not be paid on the Getty account until the check for $9000.00, which you advised under date of January 30th, would be sent us last week and which in a more recent wire you stated would be sent us this week, is received. Upon receipt of this check the balance of the commission due

(Testimony of Arthur A. Butler.)

you will be sent and upon receipt of a release from Getty on our contract and a release from Abbott on the erection we will be willing to forward you our check for the amount due you on the erection.

Regarding that portion of your wire communication which spoke of our sending you balance due Abbott on the first Getty tank; wish to advise that it is our policy to make payments until releases are in our hands. We must either have Getty's acceptance of the first tank, or his release of us from the balance of the erection of test before this amount can be paid.

Your last wire requests that we honor your draft for 60% of the draft that we had recently made on the Western Refinery proposition. As previously advised, paying commissions by drafts is not an acceptable procedure and must be discontinued. I, therefore, advised you that when we received notification from our bank that the moneys covering our draft is in their hands check covering the commissions due will be sent you.

I don't want you to feel for a minute that I am taking an arbitrary stand in this matter. All of our agents are handled in a like manner, and in view of the fact that we have been been universally successful in our arrangements with them I can see no reason whatsoever why the same sort of an agreement should not be acceptable and work satisfactorily in your case.

Yours very truly,

Manager Tank Sales.

(Testimony of Arthur A. Butler.)

MR. McCOMB: We are offering that letter for that statement, to show that there was an agency.

MR. BASSETT: To which we object on the ground it is equivocal and remote; that it doesn't tend to show that this man has been treated, will be treated, or ever has been treated, as an agent, or, if he was, whether it was a general agency, a special agency, a mere authority to send in offers, or what it is. This court certainly will not gamble upon an equivocal statement of that sort, which is merely a part of a letter, which says, "We have treated our agents in a certain way".

THE COURT: The objection is overruled, and it will be received for what it is worth. Of course it is not proof of agency, but it tends in that direction.

To which ruling defendant duly excepted.

(EXCEPTION NO. 1.)

Plaintiff here offered Defendant's Exhibit to Depositions No. 55 attached to the deposition, as follows:

EXHIBIT 55.

March 24th, 1924.

Mr. S. Reid Holland,
Los Angeles, Calif.
A. A. Butler

With reference to that portion of your wire communication of 21st instant, and also various communications and contracts received regarding the second Getty tank, and also the Hercules supposed contract;

(Testimony of Arthur A. Butler.)

we informed you sometime ago by telegraph that we are not interested in a trade and regret, therefore, to advise that the approval of the contracts is not in order. We will be willing to accept the Hercules order only on our regular term basis, involving in no way, however, the Getty Tank.

The entire matter will, therefore, be held in abeyance awaiting your and their acceptance of the matter as outlined in this communication. Under date of March 19th we received a wire communication from the Hercules Gasoline Company to the effect that you had wired them that it is more practical to erect the 12′ x 30″ Stills on location instead of erecting in shop, satisfactory erect here, change order accordingly. Wire if plans, specifications and order received. Give us some advice of shipping date. This communication was not replied to, because we felt that the entire transaction was being handled by yourself and I, therefore, wish that you would kindly communicate with them at once, advising them of our decision and communicating their reply.

Yours very truly,

Manager Tank Sales

AAB:MM

Plaintiff here offered Defendant's Exhibits attached to Depositions Nos. 73, 77 and 152, as follows:

(Testimony of Arthur A. Butler.)

EXHIBIT 73.

GRAVER CORPORATION

East Chicago, Indiana

10:28 A. M. day letter

April 4th, 1924.

Confirmation of Telegram

To Hercules Gasoline Co.,

Los Angeles, Calif.

Answering yesterdays night letter we are not proceeding with any fabrications your account stop advised Holland some days ago that we were not interested in any proposition involving trade Getty tank our W. F. Graver expected to be in Los Angeles next week and will see you.

GRAVER CORPORATION

A. A. Butler

EXHIBIT 77.

Graver Corporation

East Chicago, Indiana

April 19th, 1924

Confirmation of Telegram 11:40 Straight Wire

To Hercules Gasoline Co.

30th & Santa Fe Ave.,

Los Angeles, California.

Answering wire seventeenth quoting your wire to our W. F. Graver stop cannot rescind action our wire April fourth decling proposition Holland made you.

Graver Corporation,

Butler.

(Testimony of Arthur A. Butler.)

EXHIBIT 152.

December 11th, 1923.

S. Reid Holland,
#820 Stock Exchange Bldg.,
Los Angeles, California.

R. T. Phillips

In accordance with Mr. Butler's advice to you we are sending you herewith a revised contract covering the tankage for the Western Refining Company at Wilmington from which we wish that you would have the required number of copies made up and properly signed by the Western Refining Company and the Southwestern Engineering Company. In other words, we wish the Western Refining Company to guarantee the account inasmuch as the credit rating of the Southwestern Engineering Company only runs about $25,000 to $35,000.00. This contract will also serve as a sort of form from which you may make up future contracts of a like nature.

Inasmuch as this contract is made with the contract price payable in accordance with terms shown in our General Conditions, the clause regarding title is not included. Where any other terms except the standard ones are used, or in other words, if any deferred payments are to be made the title clause must be inserted in the contract, which makes it in effect a conditional sales agreement. We are enclosing herewith the clauses which are necessary to insert in an agreement of this kind.

(Testimony of Arthur A. Butler.)

We are also sending you a supply *a* stationery which we use for this class of work and wish that you would have contracts made up on these forms, using the binders enclosed.

We would also call your attention to the fact that where specifications are referred to they should accompany the contract which are sent in for signature in all cases, as should also the Standard General Conditions.

We trust that these instructions will be clear to you, but should there be any further questions which may come up regarding contracts, or in fact any other phase of our procedure in quoting, we wish that you would kindly get in touch with us and we will be glad to go over the matter with you.

In this particular case we should be glad to have you go back to the Western Refining Company and the Southwestern Engineering Company and obtain their signature as quickly as possible so that we may sign the contracts and have a copy in our files.

Very truly yours,

Plaintiff thereupon read from the deposition of Arthur A. Butler as follows:

"The Department of Sales comes under the jurisdiction of Mr. Bartlett; Mr. R. T. Phillips is an employee of Graver Corporation. He is assistant manager of tank sales; he is directly under me; he wrote some of this correspondence shown me as Defendant's Exhibits 3 to 152, inclusive; this was under the general direction of myself.

(Testimony of Arthur A. Butler.)

Defendant's Exhibits Nos. 100 to 103 attached to the deposition were sent by me on behalf of Graver Corporation; they are copies of certain telegrams; were sent in the usual course of business."

Plaintiff here introduced Defendant's Exhibits 100 to 103, inclusive, attached to the deposition, as follows:

EXHIBIT 100.

GRAVER CORPORATION
East Chicago, Ind.
August 23, 1923.

Confirmation of Telegram
To Thompson-Holland Co.,
820 Stock Exchange Bldg.,
Los Angeles, Calif.

Gettys wired advising he had requested you to cancel his order stop have just wired you three car numbers stop if cancellation is to stand it will be necessary to charge Gettys with such expense as we have been put to stop this matter in your hands for decision please advise. Confirming.

GRAVER CORPORATION

EXHIBIT 101.

Graver Corporataion
East Chicago, Indiana.

Confirmation of Telegram. Aug. 23rd, 1923
To Thompson-Holland Co.,
820 Stock Exchange Bldg.,
Los Angeles, Calif.

Loading the following P. R. R. cars for Gettys three one six one *m*ine two and seven five one six seven eight and three one six nine two four. Confirming.

Graver Corporation.

(Testimony of Arthur A. Butler.)

EXHIBIT 102.

Graver Corporation
East Chicago, Indiana

August 24th, 1923.

Confirmation of Telegram
To Thompson Holland Co.,
820 Stock Exchange Bldg.,
Los Angeles, California.

Our damage five thousand yours to be added in view of possibility of securing additional business from Getty we are not inclined to take advantage of this situation and would recommend leniency on your part also.

Graver Corporation.

EXHIBIT 103.

Graver Corporation
East Chicago, Indiana

Confirmation of Telegram August 25th, 1923.
To Geo. F. Getty,
536 Union Oil Bldg.,
Los Angeles, California.

Wired Thompson Holland night letter advising extent of damage if your order is cancelled please handle settlement thru them.

Graver Corporation

THE COURT: It (Exhibit 103) will be received in the same way, subject to being connected with the transaction.

(Testimony of W. F. Graver.)

MR. BASSETT: To which we object on the ground that George F. Getty to whom this wire was sent is not a party to this action nor is there any element in the issues in this case concerned with George F. Getty, and that it is incompetent, irrelevant and immaterial. Here is a wire to another person outside of this case.

THE COURT: It will be received subject to being connected with the transaction.

To which ruling defendant duly excepted.

(EXCEPTION NO. 2.)

Plaintiff thereupon read from the deposition of

W. F. GRAVER:

"My name is W. F. Graver; I reside in Chicago; I have been about thirty-two years with Graver Corporation; I am the Vice President and Treasurer and have been for about twenty *year;* James B. Graver is President; Philip S. Graver First Vice President; H. S. Graver Secretary; A. E. Lucius Assistant Secretary. I saw some of the Hercules people a few days after my conversation with Mr. Holland's office; I saw Mr. Bird and Mr. Mattei; this was at the Biltmore Hotel; Mr. Holland was present. Referring to Defendant's Exhibit No. 79 attached to the deposition, this was placed on my desk for approval about August 8th, 1923, and I approved it on that date."

Plaintiff here offered in evidence Defendant's Exhibit to depositions No. 79, as follows:

(Testimony of W. F. Graver.)

EXHIBIT 79

Office Order

7/27/23

S. Reid Holland
820 Stock Exchange—Los Angeles, Calif.
Representing—
Graver Corp.
East Chicago, Ind.

Deliver to George F. Getty,

Destination to be given later Via Santa Fe.	Freight paid to destination by you, we to pay hauling charge from railroad to base.
2 80,000 Bbl—All Steel Tanks—Gas tight	36,000.00 each
	18,000.00 to be paid on completion of tanks and satisfactory tests have been made
Erected on our property complete for 36,000.00 each me to make grade and painting to be extra and me to furnish water for listing	Bal of 18,000.00 when oil is sold time not to exceed 1 year

(Testimony of W. F. Graver.)

Tanks to be shipped from Chicago in from 7 to 10 days from receipt of order at *Each* Chicago. Interest at 7%

(signed) George F. Getty
by H. B. Gordon
Order No. 1323.

To which offer defendant objected upon the ground that it was irrelevant and merely an order, which objection was overruled.

THE COURT: It will be received, subject to being connected up.

(EXCEPTION NO. 3)

MR. BASSETT: May I at this time, in order to shorten the trial, ask that we be allowed exceptions according to the State practice, without specifically putting them into the record?

THE COURT: Yes.

"When I was in California I talked with Abbott and House in Holland's office, I don't remember if I discussed the Hercules or Getty contracts, they were paid for erecting the first Getty tank, we paid them direct."

Plaintiff here offered in evidence Defendant's Exhibit "A" (which was duly identified) attached to the deposition as follows:

EXHIBIT "A"

Geo. F. Getty
#536 Union Oil Bldg.,
Los Angeles, Calif.

1923						Sep. Debits	Credits						1923	
Sept.	21	32841		31497	May	72000.00	9000.00	Sep.	125		CB		Sept	1
"	30	Vo 9631		547	May	20.25	9000.00	Sep.	"		"		"	"
							9000.00	Sep.	"		"		"	"
							9000.00	Sept.	129		"		"	22
							9788.65	May	548	Vo	9631		Sep.	30
Oct	31	Vo 10699		567	May	5.85	1697.45	May	567	Vo	10699		Oct.	31
							24540.00		Balance				Dec.	31
						72026.10	72026.10							
1924													1924	
Jan.		Balance				24540.00	6000.00	May	154		CB		Jan.	10
							513.90	May	155		"		"	16
							9000.00	May	162		CB		Feb	22
							9000.00	May	667	Vo	5096		May	31
							26.10	May	669	Vo	5174		"	"

(Testimony of W. F. Graver.)

To which offer defendant objected on the ground that it was incompetent and irrelevant.

The objection was overruled, to which ruling the defendant duly excepted.

(EXCEPTION NO. 4.)

"Referring to Voucher No. 5096, this $9000 (the second item from the last) represents a credit for the second tank which was not erected. The $9000 under date of February 22, 1924, (being the third from the last item on the right hand side of Exhibit "A") was a check sent us by Getty Company in full payment for the contract. At that time there was $9000 due from Getty, that is, after allowing $9000 for the tank not erected. I have no information as to whether this tank is still on the Graver property except that Mr. Bird stated that he had title to the tank.

Mr. P. S. Graver on behalf of Graver Corporation approved the adjustment of the contract with Graver by which a credit of $9000 was placed with the Getty account.

Referring to the conversation at the Biltmore, our people wired the Hercules that they would not accept the Getty tank which I understood Hercules would require. There is a copy of a telegram, Defendant's Exhibit "A-100" attached to the deposition which was sent. This telegram has been read."

Defendant's Exhibit A-103 atttached to the deposition was here introduced by the plaintiff.

(Testimony of Philip S. Graver.)

"This telegram was sent by Mr. A. A. Butler, our sales manager. To a certain extent he had authority to send it, it was customary for him to send telegrams in the course of his duties.

I don't know whether there was any investigation of the Hercules credit standing, there might have been, probably Holland would have followed the procedure of most of our salesmen to get the information so that the credit could be looked up."

Plaintiff offered testimony under Section 2055 C. C. P. from the deposition of

PHILIP S. GRAVER,

as follows:

My name is Philip S. Graver; I reside in Chicago; I am first Vice President and Chairman of the Board of Directors of Graver Corporation, have been since 1895, am in charge of operation, sales, manufacturing, practically everything pertaining to the business during 1923-24. Mr. Bartlett was the general manager; it was not necessary for him to consult me about everything. There are certain policies that are formulated by the officers and directors that gave him authority to act, but on any special occasion matters were referred to me and consulted about, that is, matters of importance. K. W. Bartlett was head of the sales department in 1923-1924. A Mr. A. A. Butler was manager of tank sales.

Subsequent to meeting George F. or Paul Getty in the Palace Hotel in San Francisco, I met him in Los

(Testimony of Philip S. Graver.)

Angeles in his office. We were trying to get together on a contract so we could get the balance of our money if they did not want to take the second tank or go ahead with its erection. We offered to make them certain allowances on the erection portion. I agreed to allow them $9000 if the tank was not erected.

On February 7, 1924, there was due from Getty $18,000 under the contract (Defendant's Exhibit 79 in the deposition). This was provided that we erected the second tank or $9000 if we made the allowance on the tank for erecting it themselves. Subsequent to February 7th, 1924, there was paid $9000 on that. This came in a check accompanied by a draft for S. R. Holland for a commission he said was due him. This $9000 was payable to the balance on tank No. 2. We refused to honor the draft and instructed the bank to send the check and draft back. Afterwards the bank called us up and stated they had the check and had been instructed to put it through. We did take it and credited the Getty account with the $9000. Also gave a credit of $9000 to Getty on the erection of Tank No. 2.

The following are Defendant's Exhibits to the deposition written by me: 10, 54, 65, 66, 67, 82, 83, 132, 133, 136 and 143. These are copies of letters that were written by me to Hercules or Getty originals being mailed, the telegrams sent in the usual way."

Plaintiff here introduced Defendant's Exhibit No. 10 attached to the deposition, as follows:

(Testimony of Philip S. Graver.)

EXHIBIT NO. 10.

February 21, 1924.

Mr. S. Reid Holland,
820 Stock Exchange Building
Los Angeles, California.
Dear Sir:

A nine thousand dollar check from George F. Getty, accompanied by your draft for eight hundred and eighty-six dollars and thirty cents, the balance commission due you on this account, received by our bank today.

We are not very well pleased with the way you have handled this item. Evidently you do not realize the various conditions attached to this contract. In the first place the two tanks were sold to Getty based on half cash, balance within one year's time, and on my visit out there an amended contract was drawn up by myself, which Getty was to sign, and this provided the detail very clearly so that there would be no controversy over the contract when the provisions were lived up to.

After the first tank was finished and Getty did not desire to go ahead with the second tank, this left Abbott having a claim against our company for an adjustment on the erected price of the two tanks. It also left Getty with a claim on us in case of the first tank leaking to make it good. This is the reason we do not want to pay Abbott the entire amount for the first tank, as he has spent no money for testing the

(Testimony of Philip S. Graver.)

tank, and he should not receive the balance until the tank was tested and accepted or Getty released us from all claims and paid us the balance due us. You made a number of promises, that Getty would mail the amended contract to us, and later a check would be mailed to us, not having received either, we were in no position to pay you the balance of your commission or to make any final advances to Abbott.

We wired you very clearly that on Getty's payment for the balance and a release from he and Abbott, we would send you your commission. We would not accept any drafts from you on this account. It seems that you were premature in drawing on us for this commission, this based purely on Getty's promise that he was going to give us a check.

Getty's check received today states on same "Account tanks in full.." While this does not clearly define that he has no claim upon us we believe we can accept it as closing his side of the contract. There remains now only Abbott to be settled with, and if Abbott will sign the release which Butler sent you, we will either mail him a check or let him draw on us for the balance.

Our stand in this matter may have looked arbitrary to you, but where a company like Getty, that has made so many promises, we have got to see the money before we are willing to pay out other money on account.

You had no right to tie our check from Getty up with your draft, as this check was the property of

(Testimony of Philip S. Graver.)

the Graver Corporation, and any time you feel that you can not depend on what we tell you we agree to do, that is the time to quit doing business with our company. For your guidance in the future we will pay no commissions by sight draft. Whatever percentage of the total contract the customer pays on account, this will be your percentage against your total commission. Also all customers' accounts are to be paid direct to us by the customer. This is our regular rule that is followed by all of our men. We have had entirely too much controversy over these matters, and we have got to get down to a business basis regarding these things.

Yours very truly,

Graver Corporation

Vice President.

The introduction of this was duly objected to upon the ground that it was incompetent, irrelevant and immaterial, and the objection overruled, to which defendant excepted.

(DEFENDANT'S EXCEPTION NO. 5)

Plaintiff here introduced Defendant's Exhibit No. 67 attached to the deposition, as follows:

(Testimony of Philip S. Graver.)

EXHIBIT NO. 67.

April 2, 1924.

Mr. S. Reed Holland,
Stock Exchange Building,
Los Angeles, California.

Subject: Hercules Petroleum Company

Dear Reed:

We are still at sea regarding the standing of this contract, and do not know what your final plans in this connection are. In looking over the correspondence, you evidently made this contract with Hercules early in February, but the first we knew of it was sometime later, and did not know that you had made a trade on the Getty second tank until we received a wire from Hercules advising us of this fact. If such a deal was contemplated you should have secured our permission to make this deal, especially as we are the parties that are going to carry it through, unless you could have disposed of the tank for them; then it would simmer down to a cash proposition. We do not care to have any more material tied up in California than what we already have, and to carry this tank along, not knowing whether it could be sold, did not meet with our approval. So far, we have done nothing on the Hercules contract, and can do nothing until this tank matter is settled.

We do not know much about the Hercules Company credit, but W. F. is to look this up while he is in California.

(Testimony of Philip S. Graver.)

It looks as if you will have to play a fine Italian hand with the Hercules Company to keep from getting us in bad, and I want you to keep us posted regarding the situation.

Yours very truly,

GRAVER CORPORATION

PSG:AJ Vice President.

"In the Exhibits Defendant's Exhibits 3 to 152 attached to depositions are various letters and telegrams received by Graver Corporation from Holland, from Hercules Company and Getty that were received in due course of mail. Others in the Graver Corporation carried on some correspondence regarding these matters. I was consulted as to practically all these matters by either Phillips or Butler. I may not have instructed them just exactly to send the telegram, but the general policy necessary was outlined, and they were authorized to send these various wires or letters."

Plaintiff here offered Defendant's Exhibit 11 attached to the depositions as follows:

EXHIBIT NO. 11

Western Union Telegram

Los Angeles Calif. Feb. 22, 1924.

Graver Corp.

East Chicago, Ind.

Demurrage at Wilmington goes to five dollars per car Monday stop understand from Florian that additional contracts have been forwarded why not come to California and thaw out Phil stop Gilmore tanks

(Testimony of Philip S. Graver.)

very unsatisfactory Kinghorne has recaulked every seam one tank and third test now being made on other one which has had bottom this kind of work is poor support for sales likewise delay on quotations Rush Hercules estimate stop was elected director yesterday mercury refinery which enables me to better protect our White Star interests.

S. Reid Holland

To which offer of Exhibit No. 11 defendant objected on the ground that the same was incompetent and immaterial.

The court admitted this evidence subject to being connected up; to which ruling defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 6).

Plaintiff thereupon offered Exhibit No. 38 to the Depositions of Defendant, as follows:

EXHIBIT NO. 38.

GRAVER CORPORATION

To Graver Corp., March 14th, 1924.

Attention P. S. Graver, Vice-Pres.

Address East Chicago, Ind. File No. #102

From S. Reid Holland Geo. F. Getty Co.

Dear Sir:

Without reviewing too much detail, the contract which you revised and left with Mr. Paul J. Getty was followed up consistently and often by yours truly and I made some fifty-seven trips and then some to

(Testimony of Philip S. Graver.)

the Getty Office in an effort to have this matter closed but the general circumstances surrounding affairs and principally Mr. Getty's illness and the fact that the organization became internally disorganized resulted in a general buck passing contest. The situation has somewhat cleared itself and as I stated in a recent letter the Getty affairs are being incorporated as the George F. Getty Company with the senior as president and the son, Paul Getty, vice president and general manager. Various resignations have taken place and Paul Getty has hopes of making a good organization out of what is left. He was criticised pretty generally for buying the 80s altho as a matter of fact he voluntarily admits if he had bought the 10 when we first talked of them and filled them with cheap oil, that was then available, they would have paid for themselves long ago and he would have been way ahead, however, that opportunity is passed.

Tank #2 stands an empty monument and they have nether oil nor water to even test it and there was little likelihood of their having any need for Tank #2 as their drilling campaign in Torrance constituting some ten or twelve wells has not panned out as yet and there was every possibility of their standing us *oof* indefinitely, that is, unless we wanted to force settlement on Tank #2.

The Hercules Gasoline Company which is quite an active and growing concern needed production and a proposition was worked out early in February whereby Getty was to furnish them crude along certain favor-

(Testimony of Philip S. Graver.)

able lines for a period of five years and in consideration for the favorable price, Hercules agreed and did purchase tank #2 and at this writing it is their property. I agreed with Getty as per the enclosed contract that I would help him clear the decks and get out without loss which he naturally appreciates, and you will note that there is no mention of any subsequent test on tank #1, In fact the question did not come up, but I am still holding Abbotts check which was sent to me awaiting a letter which he is preparing guaranteeing to make good any leaks that we may be called upon to take care of. This is only a precaution on my part to take care of future contingencies. I have been obliged to hold out on you apparently on this transaction principally for the reason that Bird of a Hercules Company has changed his specifications several times and at the outset he did not want the equivalent in tonnage until sometime in July. You will note from the details which I am enclosing you in another letter on the Hercules transaction that there is ample margin for me to protect you against loss in disposing of Tank #2. I had in mind utilizing it on the Western job which I will write about in another letter, and had the diameters change on the 55's for that particular reason.

If this Hercules transaction meets with your approval, I will work out a disposition of tank #2 that will be satisfactory.

At this writing the Western contract has been partially disposed of. Two of the 55's were let yester-

(Testimony of Philip S. Graver.)

day to the Western Pipe and Steel Co., and the other four will be refigured as I will explain in another letter.

In addition to this possibility of turning tank #2 promptly, and in connection with my letter of this date relative to White Star, if agreeable to you I would like to utilize Getty Tank #2 as a complete tank for #3 on the White Star job providing, however, that they will take care of the payments on Tank #2 as indicated in my letter of this date and be in a position to take care of the obligations on Tank #3, which would obviate the necessity of shipping any more steel from Chicago right away but would give them the tank #3 within the next sixty days. In either event, Getty will handle the transportation of tank #2. Please bear in mind that in endeavoring to work out this solution I had in mind the final settlement for you on the Getty account and I feel that the transaction with the Hercules Company will be a good one for us as they are going to need considerably more equipment and storage. At this writing I am waiting your final figures and will probably write you during the day giving you all the facts relative to the Hercules matter.

I trust I have made myself clear and that this meets with your approval.

Yours very truly,

(Signed) S. Reid Holland

To the introduction of which defendant objected upon the ground that the same was incompetent, ir-

(Testimony of Philip S. Graver.)

relevant and immaterial. The objection was overruled. Defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 7)

"Holland had specifications and inter-office correspondence and contract forms. Exhibit A-1, A-B-2 and 2-A annexed to the deposition are on forms supplied by our sales department. Holland never discussed with me the question of placing the name of Graver Corporation on his stationery; it is a general custom, however, among our engineering agents to put our name on their letterheads to cover items that they sell."

Plaintiff here offered Defendant's Exhibits 16, 37, 38, 39, 138, 139, 142 and 144, as to that portion of those exhibits which contained on the stationery of S. Reid Holland the following: "Graver Corporation, inter office correspondence, Date, File No. To, Address, From." To which evidence the defendant objected on the ground the same is incompetent, irrelevant and immaterial. The objection was overruled and the evidence admitted subject to being connected; to which ruling defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 8.)

The correspondence and telegrams with respect to Getty and Hercules transactions were carried on through Holland principally; this was because he was on the ground at Los Angeles and made the preliminary transaction with the companies, and we figured he was the man to be advised regarding detail.

(Testimony of Philip S. Graver.)

Mr. Butler sent Defendant's Exhibit No. 103 to deposition. I think I authorized this.

The work of erecting Getty tank No. 1 was not done by Graver but by Abbott & House. I don't believe we had any correspondence with Abbott & House. Mr. Holland handled that, as he took the contract for the erection. That is, the Graver Corporation sold the material knocked down and he was to take care of the erecting. I know J. Parker Thompson, I believe he was in partnership with Holland handling pipe and other supplies and Holland was handling tanks. This in September and October, 1923. While I was in California in 1923 I had a general talk with Thompson and Holland; Holland was to handle all the tank work and any inquiry regarding tanks would be taken up by Holland. Afterwards Holland told me he was going to dissolve with Thompson.

I first met Holland in Los Angeles in 1923; before that he had asked for inquiries and we had quoted him prices and he had made some sales, in particular the Getty contract of August, 1923. This calls for the purchase of tanks No. 1 and 2; we supplied Holland with various blanks on which appeared the name of Graver Corporation and I presume the sales department gave him from time to time literature and other forms to be used. The general inference to anyone seeing these things would be that in some ways he represented the Graver Corporation. Referring to Exhibit 79 and the statement written at the top of the order, 'S. Reid Holland, representing Graver Cor-

(Testimony of C. R. Bird.)

poration,' I can't tell you whether any exception was taken to that statement. If there is anything in the correspondence in this regard, it will speak for itself.

Referring to Defendant's Exhibit 73 attached to deposition, telegram dated April 4th, 1924, from Graver Corporation to Hercules, I think this is the first communication by Graver to Hercules declining to be bound by the contracts of February 7, 1924. All correspondence regarding this contract prior to telegram of April 4 just referred to was directed on behalf of Graver Corporation to S. Reid Holland.

C. R. BIRD,

a witness on behalf of the plaintiff, testified as follows:

"My name is C. R. Bird; I am superintendent Hercules Gasoline Company, have been for four years, and was during the month of February, 1924. The contract between George F. Getty and Graver Corporation dated February 7, 1924, was first seen by me in Getty's office. I saw it signed by S. Reid Holland. I think there were two carbon copies of it which were signed. (This was here offered for identification as Plaintiff's Exhibit No. 1.) Referring to contract between Hercules Gasoline Company and Graver Corporation dated February 7, 1924, I first saw that in Mr. Getty's office at the same time the other document was signed; I saw S. Reid Holland sign it and I signed it myself; there were two carbon copies, all of which were signed. I never saw the contract between

(Testimony of C. R. Bird.)

George F. Getty and the Graver Corporation dated February 7, 1924.

Plaintiff here offered contract Plaintiff's Exhibit 2 for identification.

Paul Grimm, Andrew Mattei, Jr., S. Reid Holland and myself were present when these contracts were signed, on February 7, 1924, at the office of George F. Getty.

Q Did you have any conversation with Mr. Holland regarding his authority to represent the Graver Corporation?

This was objected to on the ground it is incompetent, irrelevant and immaterial. The objection was overruled. Defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 9.)

This conversation extended over two hours; the gist of it was that Hercules Gasoline Company was going to buy a tank from Getty and Graver Corporation would take the tank off our hands at the same price we paid Getty, provided we would give them an order for a specific amount of steel. In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on a Graver letterhead signed Graver Corporation by W. F. Graver. This letter was a long one and I did not see all of it. The gist of the part that I saw was that Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation, particularly the settle-

(Testimony of C. R. Bird.)

ment of the tank deal with Getty. He further said if we were not satisfied we could go over to the bank and an official there would show us certain documents. We did go over to the bank but the official happened to be out. We were both satisfied by this letter and by files that Getty had in his office that I had seen, that Holland had ample authority. This letter I referred to was signed Graver Corporation, by W. F. Graver, and was exhibited at the same time these contracts were signed.

Whereupon Plaintiff's Exhibits 1 and 2 for identification were introduced in evidence as Plaintiff's Exhibits 1 and 2, as follows:

EXHIBIT NO. 1.

GRAVER CORPORATION

Los Angeles, Calif.,
February 7, 1924.

HERCULES GASOLINE CO.,
2411 East 30th St., Los Angeles, Calif.

Gentlemen:

In behalf of the Graver Corporation of East Chicago, Ind., whom I represent on the Pacific Coast, I will agree that upon due evidence of your having acquired title to fabricated steel, described as Graver Tank number two, now said to be on hand complete on Geo. F. Getty property at Santa Fe Springs, Calif., I will contract to have shipped promptlv as directed and not later than August first, 1924, the equivalent in tonnage at prevailing prices, date of

(Testimony of C. R. Bird.)

shipment and erection of said Graver Tank number two, Viz., $36000.00 and for which I will agree to accept in exchange and have credit issued by the Graver Corporation in the amount of $27000.00, and further provided that the said tonnage will be erected by or at the direction of the Graver Corporation in or near Los Angeles, subject to their general field conditions herewith attached and at prevailing price for this class of work and for which payment will be made promptly in accord with said General Field conditions.

Yous truly,
Graver Corporation,
By S. Reid Holland

Approved.
Graver Corporation
East Chicago, Ind.
By .....

Accepted
HERCULES GASOLINE CO.,
By C. R. Bird

EXHIBIT NO. 2

GRAVER CORPORATION
LOS ANGELES, CALIF. February 7, 1924

Geo F. Getty,
Bartlett Bldg.,
Los Angeles, Calif.,
Dear Sir:

In behalf of the Graver Corporation of East Chicago, Ind., whom I represent as your files will dis-

(Testimony of C. R. Bird.)

close, I will agree that upon receipt of your check for $9000.00, being the balance due the Graver Corporation on Tank number two, now said to be on hand at your *h*ard at Santa Fe Springs, Calif., Complete, and a further consideration embodied in revised contract made between J. Paul Getty for the above, and P. S. Graver for the Graver Corporation, stipulating that the said steel and tank equipment including erection tools etc., shall be moved from Santa Fe Springs to another location in the Los Angeles Basin, promptly as requested, and at the expense of Geo. F. Getty, that when these provisions are complied with, that I will on the part of the Graver Corporation, agree to the execution of a contract between the Graver Corporation and the Hercules Gasoline Company to supplement an equivalent in tonnage viz., $27000.00 in fabricated steel to be shipped on or before August first, 1924. and at the prevailing price of such steel and that such agreement shall provide for the erection of the said steel at prevailing price for such erection, but in no case to be less than $9000.00, it being the sense of this agreement that this exchange is to supplement the full contract price for the erection of tank number two, at Santa Fe Springs, Calif., Viz., $36000.00.

This agreement when executed and signed by parties hereto shall constitute a release on the part of

(Testimony of C. R. Bird.)

Geo. F. Getty from further execution of order and contract of August 1923.

Yours very truly,

Graver Corporation,

Geo. F. Getty By Reid S. Holland

By Geo. F. Getty

Graver Corporation,

Attest Mabel McCreery East Chicago, Ind.,

Secretary By .....

Referring to agreement between Getty and Graver Corporation dated February 7, 1924, one of the contracts, Plaintiff's Exhibit "A", is not altogether like the other. (One of these forms was marked Plaintiff's Exhibit 3 for identification.) That is George F. Getty's signature, on Plaintiff's Exhibit 4.

Referring to Plaintiff's Exhibit 4 which was here introduced in evidence, as follows:

I had a conversation with W. F. Graver in Los Angeles in the presence of Holland and A. Mattei, Jr., this at the Biltmore Hotel about April 10, 1924; the gist of this was that I wanted to find out why the tanks and fabricated steel we had ordered had not been shipped. Graver said if we would sit still in the boat he was sure everything would come out all right and the tanks would be shipped within a very short time. He said naturally they wanted to dispose of the 80,000 barrel tank they had there, they had a deal on with the Western Refining Company and thought this Company would be on the dotted line the next day, and said if we would just hold our horses

(Testimony of S. Reid Holland.)

we would get all our stuff and everything would come out as arranged with Mr. Holland. He referred to Mr. Holland as "our Mr. Holland", and Holland spoke up several times and said we were in a little bit of a hurry, but everything would come out all right, and we went away thinking everything would be all right. We afterwards sold this 80,000 bbl. tank to Western Pipe & Steel Company for $12,000. I tried to sell this to five or six different firms in Los Angeles, but I couldn't get any other orders, no one wanted the tank.

Due to the fact that this contract between Graver and Hercules was not completed, Hercules was put to some additional expense. This was on account of labor on stills, due to the fact that Graver did not ship promptly; this amounted to about $2,300. and our payroll and materials figured up $750., total was $4,200.

Testimony of

S. REID HOLLAND,

who was served with a subpoena duces tecum and who stated that he did not have the letter referred to in his possession, and that none of the other letters referred to in said subpoena were in his posession or produced.

I am the Holland referred to in these agreements. I do not have the letter that Mr. Bird refers to; I never did have; I have looked every place where I ordinarily place letters. Do not recall ever seeing any letter of that description.

(Testimony of C. R. Bird.)

Whereupon defendant renewed its objections to any evidence regarding said letter, and moved to strike evidence concerning the same out. This objection was overruled and motion denied. Defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 10.)

C. R. BIRD (resuming).

CROSS-EXAMINATION.

S. Reid Holland was in Getty's office when this deal was made and saw the initial payment made by us on the tank and he saw the bill of sale which was handed to us.

EXHIBIT NO. 4

Graver Corporation

East Chicago, Indiana

9.00 P. M. Night Letter

Confirmation of telegram Feb. 8th, 1924.

To S. Reid Holland

819 Stock Exchange Bldg.,

Los Angeles, Calif.

Hercules refining Co. prices four crude stills ten by thirty feet our standard ninety two hundred thirty dollars shop erected except dome looses ship first still three weeks second two weeks later balance one per week stop two tanks ten thousand barrel with three *sixttenths* water top eighty four hundred forty dollars knocked down eleven thousand nine hundred eighty dollars erected or with quarter inch water top eighty seven hundred sixty dollars knocked down twelve

(Testimony of C. R. Bird.)

thousand two hundred ninety dollars erected stop two five thousand barrel tanks with three sixteenths water top fifty one hundred ten dollars knocked down seventy six hundred fifty dollars erected or with quarter inch water top fifty two hundred seventy dollars knocked down seventy eight hundred thirty dollars erected stop all these tanks our standard sizes and specifications ship one week ship two condensers ten by six by forty feet thirteen hundred, ten dollars knocked down twenty four hundred dollars erected all plates quarter inch our standard drawing ship five weeks stop all prices net to you delivered Los Angeles no paint camp or hauling beyond standard general conditions requirements no foamite connections as this firm will not sell same to us all prices per item stop also quote six standard fifty five with three sixteenths cone roof at twenty three thousand three hundred sixty five dollars each erected Los Angeles net to you ship starting immediately also advise you rail and water shipment would cut about eight hundred dollars per tank more basing price delivered San Pedro harbor confirming.

Graver Corporation
Phillips.

This was about the first week in February, 1924. This bill of sale was delivered and acknowledged October 10th, but it was executed before that. The initial payment was $3,000. and we paid $3,000. a month thereafter until the total of nine payments were made.

(Testimony of H. P. Grimm.)

H. P. GRIMM,

witness on behalf of plaintiff:

I am in the oil business and am associated with George F. Getty, and was associated with him in the month of February, 1924; have been associated with him for three years past. Referring to Plaintiff's Exhibits 1, 2 and 3 for identification, I saw these in our office when they were signed in the presence of Mr. Holland, Mr. Bird and Mr. Mattei. I think there were three of each and they were all the same.

Q Did you hear a discussion between Mr. Bird and Mr. Holland as to Holland's authority to sign these contracts?

A Yes, sir.

Q What was said?

This was objected to on the ground it was incompetent, irrelevant and immaterial, and the objection overruled. Defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 11.)

Bird questioned Holland as to whether he had authority to act for the Graver Corporation. Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery signed by one of the Gravers, tending to show Holland had authority to act for Graver Corporation.

Testimony as to the contents of this letter was objected to on the ground that the same was incompetent, irrelevant and immaterial and without founda-

(Testimony of Andrew Mattei, Jr.)

tion, and the objection overruled. Defendant duly excepted.

(DEFENDANT'S EXCEPTION NO. 12.)

I remember the letter distinctly because Holland said, "Here is a letter from Graver Corporation with their heading on," tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; it was signed by one of the Gravers whose initials begin with a "W".

Referring to Defendant's Exhibit No. 103 attached to deposition, witness said:

I received that telegram.

The check of George F. Getty, Plaintiff's Exhibit 7, was introduced in evidence as follows. It was admitted that this was received and paid.

CROSS-EXAMINATION.

I never saw any of the Gravers; I don't know that I ever saw any of their signatures except on a contract between Paul Getty and the Graver Corporation. This letter I refer to was signed by Graver but I do not recognize the signature. The name of Graver appeared there, that is all.

When the check for $9,000. was paid, there was $9,000. balance due for Getty Tank No. 2.

ANDREW MATTEI, JR.,

witness on behalf of plaintiff, testified as follows:

I am treasurer of Hercules Gasoline Company. I saw Plaintiff's Exhibits 1, 2 and 3 for Identification

(Testimony of Andrew Mattei, Jr.)

in Getty's office February 7, 1924; there was an original and two copies of each; I saw them signed; Holland, Bird and Grimm were present. Bird and Grimm were skeptical about Holland's authority; he produced a letter with Graver Corporation printed on it at the head and folded it over and showed the lower portion. The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles; it was signed Graver Corporation by W. F. Graver. Holland stated he had authority to act for Graver Corporation. I afterwards met W. F. Graver at the Biltmore Hotel April 10, 1924; Holland and Bird were also present. We asked what they were going to do with reference to the 80,000 barrel tank from Getty. They said they had a deal on with the Western Refining Company and they were going down to close the deal. Mr. Graver referred to Mr. Holland as "our Mr. Holland" and stated "We are going down to the Western Refinery with reference to the tank" and that everything will be shipped according to our order in a short time.

CROSS-EXAMINATION.

I did not ask for a copy of that letter, which letter was folded over so that I only saw part of it. We asked for additional evidence of Holland's authority, and we went down to the bank to obtain this, but the gentleman at the bank was not in and we never went back. I don't know the date of the letter. W. F. Graver's name was apparently signed to it. I could not verify the signature of Mr. Graver. I never

(Testimony of William G. Talbot.)

talked with Mr. Graver about this letter having been shown me, or did not ask him if such a letter was authentic.

WILLIAM G. TALBOT,

a witness on behalf of the plaintiff:

I am local manager of the Western Pipe and Steel Company; have been for eight years and was in 1924. I know Graver Tank #2, 80,000 bbl. tank; our company purchased this from Hercules for $12,000.

During 1924 I was familiar with the market price of tanks. I saw this tank. Its market value in the condition we found it was $12,000; the tank was not set up. It was scattered about on the Getty property and was knocked down. I think the market value would be $12,000; we subsequently disposed of it to the Pacific Oil Company for $28,500. We first collected it and hauled it in to our plant where it was unloaded and stored. We sold it directly, we had to furnish the materials, bolts, etc. which amounted to $1000. It was erected four miles from Taft, Kern County. The actual cost, including labor and factory expense and cartage from Los Angeles to the tank site aggregated $27,000; this included $12,000 paid by us for the tank.

CROSS-EXAMINATION.

I can produce statement from our books showing items referred to, steel at that time, the market price was around 2½¢ a pound.

(Testimony of S. Reid Holland.)

REDIRECT EXAMINATION.

We purchased this tank in May, 1924.

WHEREUPON the plaintiff rested.

Defendant here made a motion for a nonsuit upon the grounds that plaintiff had not established facts sufficient to enable it to recover; on the further ground that plaintiff had not proved or established the esential allegations of the complaint; on the further ground that it did not appear that the contract alleged in the complaint was ever executed or existed between plaintiff and defendant. Motion for nonsuit was denied and defendant excepted.

(DEFENDANT'S EXCEPTION NO. 13.)

Defendant here moved the court to strike out the various matters and things read by plaintiff's counsel from depositions and exhibits tendered or offered in evidence herein, upon the ground that the same had not been connected up, or a foundation laid therefor, as counsel represented it would be laid. This motion was denied and defendant excepted.

(DEFENDANT'S EXCEPTION NO. 14.)

The following evidence was then introduced by the defendant:

S. REID HOLLAND:

I am a manufacturer's representative, have been for four years last past. I represent several eastern firms; I solicit business for them; I have an office in this city; I pay the rent; no one pays any of that expense. My method in getting business is to obtain quotations from manufacturers and then add my

(Testimony of S. Reid Holland.)

profit on any sale that is made. I never had any contract of employment with Graver Corporation; our arrangement was that they quoted me net prices on every inquiry and I added my profit and made the quotation to any prospective customer. If I ever received an order I sent it direct to the manufacturer for approval.

Referring to Plaintiff's Exhibit 2, there are two pages of printing entitled "Standard General Conditions". They are the standard field conditions of Graver Corporation covering all contracts.

Referring to Plaintiff's Exhibit 2, that was signed by me. There were three or four copies made at that time; they were left in Getty's office first unsigned by me subject to the payment by Getty of $9000. I returned a few days later and found the check available. Mr .Getty had signed one of the copies. Mr. Bird, on behalf of the Hercules, signed three. I took Getty's copy and the check and asked for the other two, but was told they had been mislaid. I obtained two copies signed by Mr. Bird for the Hercules and sent those papers all to Graver Corporation for ap-approval. The standard general conditions on the back were attached to all the copies, that is, the Hercules contract; the Getty contract did not require it because it had nothing to do with erection.

The payment of $9000 was an unpaid balance due from Getty to Graver on Tank No. 2. I obtained the order for and sold this tank for Graver Corporation.

(Testimony of S. Reid Holland.)

I never made any contract at any time in the name of Graver Corporation. I obtained my instructions to act from the Graver Corporation. Each case was handled on its own basis; I never was at the company's plant.

Early in February I went to Getty's office and met Bird and Mattei of the Hercules. Grimm on behalf of Getty wanted me to help them out on this tank that they owed $9000 on. I had a letter in my possession then from one of the Gravers, I think P. S., telling me that his brother would be in California in a short time, but there was no reference made to this other matter therein, although there might have been some reference to Getty's past due account, but there was no literal authority or anything to that effect. I have looked and cannot locate any such letter. I introduced Bird and Mattei to Mr. Anderson at the First National Bank so they could get their own information about Graver Corporation. There never was any authorization or authority for me to act as agent in this bank. We went to the bank for them to look up the Graver Corporation, and no mention was made at the bank of my authority.

Contract was signed in triplicate so they could be sent to Chicago for approval, and a copy for each one of the principals. I explained this to Mr. Bird that two copies would be sent to Chicago for approval and returned to him and his copy retained as a memorandum only until the others could be approved.

(Testimony of W. G. Talbot—S. Reid Holland.)

CROSS-EXAMINATION OF W. G. TALBOT.

The witness produced a statement showing that this company paid $12,900 odd dollars to put the tank in shape to sell; of this labor was $6600, freight and hauling $4000, hotel expenses $400, compensation insurance $390, grease, ice, etc., $359; electricity for running line to operate compressor, $526; power consumed, $344. This with the purchase price made a total of $26,000 some odd dollars.

This was regular plate steel and had a regular market value all over the country and was staple. This was worth $45 a ton in this market, but this cost does not include the fabrication, $15 would not be an excessive fabrication cost in Chicago where this was fabricated. Market price is based on Pittsburgh plus freight.

EXAMINATION OF MR. HOLLAND (Continued.)

Since adjournment yesterday I made a search for letter from Graver Corporation to myself, and particularly the letter referred to in the testimony of Mr. Grimm, Mr. Mattei and Mr. Bird. I have found that letter and I produce it. This letter was produced the latter part of January and shown to Mr. Grimm under the following circumstances:

We met to discuss this Tank No. 2, upon which Getty owed $9000. I stated in order to arrive at any deal it would be necessary for Getty to pay the balance due. I said that if they would sell it to Hercules we would endeavor to make some arrangement whereby a trade could be effected. The price of the

(Testimony of S. Reid Holland.)

tank was discussed. The question was asked by the Hercules people whether Graver would trade that tank for other materials; I told him I thought that I could place this tank if I had time enough. Mr. Bird said they had six to nine months before they would need any materials and that would be ample time to turn the tank. Mr. Grimm suggested some question whether I represented Graver. I happened to have this letter in my pocket in reference to the Graver-Getty account and I took it out and folded it over that portion which referred to the details of the Getty account and showed the heading and the last clause of the letter indicating that I was in a position to close the Getty account. I was interested in that account because I had a commission coming and was anxious to close the account. I concealed the rest of the letter because there were some comments there about Getty being slow pay that I did not care to show these other gentlemen.

Defendant's Exhibit "B" was here introduced in evidence after the words "as hereinafter shown there is a crease showing that at one time it had been folded at that place," and after the crease is the sentence, "Trusting you will get after Getty, etc."

This letter was creased and folded as it now appears at that time, and this is what I showed them. I was familiar with the value of tankage in 1924 in this market. There was 308 tons in this tank, the market value was $80 a ton fabricated and knocked down f. o. b. This $80 a ton is figured upon at Pittsburgh

(Testimony of S. Reid Holland.)

or Chicago plus freight to Los Angeles, plus fabrication cost, plus handling. Steel of this character does not deteriorate within a few months, in fact, it should stay out a year without any depreciation; in fact, these tanks are generally left unpainted for possibly a year and no rust sets in until the mill scale is off. That tank was absolutely new and the total value was $24,000 during these months. These figures are substantiated by printed figures in the standard magazines of the industry.

I signed these contracts dated February 7th to Graver in the early part of March, I believe, about the 14th. I delayed because I wanted to get Getty's check and that specification from Hercules so as to show Graver what they wanted to exchange. I discussed this matter with Mr. Bird and stated that the contracts as far as they were concerned would have to go to Chicago with specifications for Graver's approval. I never made a contract in my life for Graver that was not approved at the home office.

Referring to conference at the Biltmore Hotel with Mr. Graver, Mr. Mattei and Mr. Bird, Mr. Graver said that his corporation had turned down the proposition until a customer was obtained for the tank. Mr. Graver explained that we had been to the office of the Western Refining Company and that probably they might buy the tank within a short time. Mr. Graver at that time did not agree to fulfill the contract or make a settlement; Mr. Graver stated that the tank did not belong to the Graver Corporation. I

(Testimony of S. Reid Holland.)

never showed any other letter than the one I have introduced in evidence, and I never had any letter of authority from Graver to make a sale or contract except I had authority to adjust the Getty balance of $9,000.

CROSS-EXAMINATION.

These contracts were prepared in my office, an original and two or three copies; they were identical in all respects. I told Bird that this contract would have to go to Chicago for approval. This was before the contracts were signed.

This witness testified that his deposition had been taken in this action on October 24, 1924. The witness was asked if he did not recall that Mr. Mattei or Mr. Grimm or Mr. Bird asked him as to his authority to represent the Graver Corporation. In that deposition the witness answered, "Not specifically as such". The witness was further asked in that deposition if one of those three gentlemen did not ask as to his authority to represent the Graver Corporation, and if he did not reply that he was their agent here and authorized to represent them. His answer to that question was that he did not make such a statement, but that he stated that he represented Graver Corporation in that he was in a position to submit proposals of this character and take orders subject to Graver Corporation's confirmation. The witness stated further that he did not recall at that conversation that he showed Mr. Grimm or Mr. Bird a letter from Graver Corporation authorizing him to act. The witness stated further

(Testimony of C. R. Bird.)

in that deposition that he did not show Mr. Bird or Mr. Mattei a letter signed by Graver Corporation authorizing him to act and represent them here in any capacity, and that he never had such a letter.

C. R. BIRD,

a witness on behalf of defendant:

I negotiated the sale of the tank to the Western Pipe and Steel. I did not inquire the market price of steel at that time. I asked three oil companies and I think a fourth, and the Lacy Manufacturing Company if they would buy it, but they would not. Referring to Plaintiff's Exhibit 1, this required Getty to move the tank from Santa Fe Springs at Getty's expense, but we did not require Getty to pay that moving expense or endeavor to charge it to him.

CROSS EXAMINATION.

I never had a conversation with Mr. Holland to the effect that the contracts had to go to Chicago for approval.

It was here stipulated between counsel that Mr. Wm. E. Lacy, if called, would testify that he is qualified as an expert and manufacturer of oil tanks, and was in 1924. This tank weighed 595,000 lbs.; the market value of the steel as this was punched and ready for erection was 3½¢ a pound, or a total of $20,825.

Same stipulation was entered into with reference to the testimony of Mr. Lewis, except that he stated the

(Testimony of C. R. Bird.)

market value of this tank was $23,300 in March, $23,000 in April and $22,700 in May.

The defendant hereupon introduced in evidence the depositions on file, portions of which had been read. This was received with the stipulation that the words written on the pages of the contract between Hercules and Graver and Graver and Getty, as follows: "Approved Graver Corporation, East Chicago, Indiana, By.....", were not written there when these papers were made in Los Angeles; that is, they were made and signed here.

PLAINTIFF'S REBUTTAL.

C. R. BIRD

Mr. Holland never stated that the contracts would be subject to approval in Chicago. Our copies were delivered the day they were signed. Referring to Defendant's Exhibit "B", I never saw that letter before.

CROSS EXAMINATION.

My recollection is that this letter was written on white paper. It was so far away from me I couldn't read it, but that portion I did see was the last paragraph. It seemed to be a business letter signed Graver Corporation by W. F. Graver. The Graver Corporation name was typewritten. I don't remember the wording, but the gist of it was that Holland was their authorized agent. I never asked to see the letter again, and I don't know to whom it was addressed or the date of it.

(Testimony of H. P. Grimm—Andrew Mattei.)

H. P. GRIMM,

witness for the plaintiff in rebuttal:

Mr. Bird questioned Holland about his authority to act for Graver, and Holland made some remark, let them go over to the bank to satisfy them. Referring to Defendant's Exhibit "B" I never saw that letter.

CROSS EXAMINATION.

The color of the paper the letter was written on was white. There was a printed heading on it. I saw it before it was folded but did not read it, but I did read the heading. I read the bottom part, I don't know how many lines there were, probably three inches.

ANDREW MATTEI,

a witness in rebuttal on behalf of plaintiff:

Referring to Defendant's Exhibit "B", I never saw that letter until this morning.

CROSS EXAMINATION.

The only part of the letter I saw was Graver Corporation and it was addressed S. Reid Holland. I did not pay any attention to it until it was folded. I don't know the date. I read the bottom portion when he handed it over to be read. I therefore concluded that this Exhibit "B" is not the letter, because it does not give general authority to Holland.

(Testimony of William G. Talbot.)

WILLIAM G. TALBOT,

witness in rebuttal:

Referring to Defendant's Exhibits "C" and "D", prices given by Mr. Lewis and Mr. Lacy, I can explain the discrepancy because these figures are based on their 80,000 barrel tank, and I imagine they base these figures on full profit, and there was lower quotation at that time for knocked down fabricated tanks. There would not be any difference between new tanks and those which had been lying around for awhile, that is, not to any great extent; plate steel does not deteriorate a great deal by being in the open. This plate was in very good condition, but it was not our standard; we sell our standard products, not the make of another manufacturer. There is a difference between the price at which we would sell a tank and the price at which we would buy it.

The defendant presents the foregoing as its bill of exceptions herein and prays that the same may be settled, allowed and certified as part of the record herein.

Wilbur Bassett
Carroll Allen
Attorneys for Defendant.

THIS IS TO CERTIFY that the foregoing Bill of Exceptions tendered by the defendant is correct in

every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open court this 16th day of March, 1926.

Edward J. Henning
United States District Judge.

[Endorsed]: No. 1735-B Dept. Law In the District Court of the United States in and for the Southern Dist. of California Southern Division Hercules Gasoline Co. a corporation plaintiff vs. Graver Corporation defendant Engrossed Bill of Exceptions. Filed Mar 16 1926 Chas. N. Williams, Clerk. By R S Zimmerman Deputy Clerk. Wilbur Bassett attorney at law 432 Van Nuys Building Los Angeles, Cal.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

HERCULES GASOLINE CO., a corporation, Plaintiff, vs. GRAVER CORPORATION, Defendant.) No. 1735-B.

STIPULATION

The parties hereto by their respective counsel hereby consent that the Court may sign, settle and allow the

Bill of Exceptions of plaintiff in error herein within ten (10) days from the 6th day of March, 1926.

McComb & Hall
Attorneys for Plaintiff.
Carroll Allen
Wilbur Bassett
Attorneys for Defendant.

Dated March 6, 1926.

[Endorsed]: No. 1735-B Dept. Law In the District Court of the United States in and for the Southern District of California Southern Division. Hercules Gasoline Co., a corporation, Plaintiff vs. Graver Corporation Defendant Stipulation Filed Mar 16 1926 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk. Wilbur Bassett Attorney at Law 432 Van Nuys Building Los Angeles, Cal. Main 6677 Attorney for.....

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

HERCULES GASOLINE CO., a corporation,

Plaintiff,

vs.

GRAVER CORPORATION,

Defendant.

No. 1735-B Law.

PETITION FOR WRIT OF ERROR.

TO THE HON. EDWARD J. HENNING,

Judge of said Court:

Comes now Graver Corporation, by Wilbur Bassett and Carroll Allen, Esqs., as its attorneys, and, feeling itself aggrieved by the final judgment of this Court entered against it in favor of plaintiff on the 7th day of December, 1925, hereby prays that Writ of Error may be allowed to it from the Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States in and for the Southern District of California; and in connection with this petition petitioner herewith presents its Assignment of Errors.

Wilbur Bassett
Carroll Allen
Attorneys for Plaintiff in Error.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

HERCULES GASOLINE CO., a corporation,	)	
Plaintiff,	)	No. 1735-B Law.
vs.	)	ASSIGNMENT OF ERRORS.
GRAVER CORPORATION,	)	
Defendant.	)	

And now comes the plaintiff in error, by Wilbur Bassett and Carroll Allen, Esqs., its attorneys, and in connection with its petition for a Writ of Error says that the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to wit:

1. The Court erred in not sustaining the demurrer of the plaintiff in error and the defendant below to the complaint.

2. The Court erred in not sustaining the demurrer of the defendant to the evidence of the plaintiff, made at the close of plaintiff's case.

3. The Court erred in admitting the following evidence:

(a) "MR. McCOMB: We are offering that letter (Exhibit 6) for that statement, to show that there was an agency.

MR. BASSETT: To which we object on the ground it is equivocal and remote; that it doesn't tend to show that this man has been treated, will be treated, or ever has been treated, as an agent, or, if he was, whether it was a general agency, a special agency, a mere authority to send in offers, or what it is. This court certainly will not gamble upon an equivocal statement of that sort, which is merely a part of a letter, which says, 'We have treated our agents in a certain way'.

THE COURT: The objection is overruled, and it will be received for what it is worth. Of course it is not proof of agency, but it tends in that direction."

(b) "Plaintiff here introduced Defendant's Exhibit 100 to 103, inclusive, attached to the deposition.

THE COURT: It (Exhibit 103) will be received in the same way, subject to being connected with the transaction.

MR. BASSETT: To which we object on the ground that George F. Getty to whom this wire was sent is not a party to this action nor is there any element in the issues in this case concerned with George F. Getty, and that it is incompetent, irrelevant and immaterial. Here is a wire to another person outside of this case.

THE COURT: It will be received subject to being connected with the transaction."

(c) "Plaintiff here offered in evidence Defendant's Exhibit to Depositions No. 79.

To which offer defendant objected upon the ground that it was irrelevant and merely an order, which objection was overruled.

THE COURT: It will be received, subject to being connected up.

MR. BASSETT: May I at this time, in order to shorten the trial, ask that we be allowed exceptions according to the State practice, without specifically putting them into the record?

THE COURT: Yes."

(d) "Plaintiff here offered in evidence Defendant's Exhibit 'A' (which was duly identified) attached to the deposition.

To which offer defendant objected on the ground that it was incompetent and irrelevant."

(e) "Plaintiff here introduced Defendant's Exhibit No. 10 attached to the deposition.

The introduction of this was duly objected to upon the ground that it was incompetent, irrelevant and immaterial, and the objection overruled, to which defendant excepted."

(f) "Plaintiff here offered Defendant's Exhibit 11 attached to the depositions.

To which offer of Exhibit No. 11 defendant objected on the ground that the same was incompetent and immaterial.

The court admitted this evidence subject to being connected up; to which ruling defendant duly excepted."

(g) "Plaintiff thereupon offered Exhibit No. 38 to the Depositions of Defendant.

To the introduction of which defendant objected upon the ground that the same was incompetent, irrelevant and immaterial. The objection was overruled. Defendant duly excepted."

(h) "Plaintiff here offered Defendant's Exhibits 16, 37, 38, 39, 138, 139, 142 and 144, as to that portion of those exhibits which contained on the stationery of S. Reid Holland the following: 'Graver Corporation, inter office correspondence, Date, File No. To, Address, From.' To which evidence the defendant objected on the ground the same is incompetent, irrelevant and immaterial. The objection was overruled and the evidence admitted subject to being connected."

(i) "Q Did you have any conversation with Mr. Holland regarding his authority to represent the Graver Corporation?

This was objected to on the ground it is incompetent, irrelevant and immaterial. The objection was overruled."

(j) "I am the Holland referred to in these agreements. I do not have the letter that Mr. Bird refers to; I never did have; I have looked every place where I ordinarily place letters. Do not recall ever seeing any letter of that description.

Whereupon defendant renewed its objections to any evidence regarding said letter, and moved to strike

evidence concerning the same out. This objection was overruled and motion denied."

(k) "Q Did you hear a discussion between Mr. Bird and Mr. Holland as to Holland's authority to sign these contracts?

A Yes, sir.

Q What was said?

This was objected to on the ground it was incompetent, irrelevant and immaterial."

(l) "Bird questioned Holland as to whether he had authority to act for the Graver Corporation. Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery signed by one of the Gravers, tending to show Holland had authority to act for Graver Corporation.

Testimony as to the contents of this letter was objected to on the ground that the same was incompetent, irrelevant and immaterial and without foundation, and the objection overruled."

(m) "Defendant here moved the court to strike out the various matters and things read by plaintiff's counsel from depositions and exhibits tendered or offered in evidence herein, upon the ground that the same had not been connected up, or a foundation laid therefor, as counsel represented it would be laid."

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed.

Carroll Allen
Wilbur Bassett
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1735-B Dept. Law In the District Court of the U. S. In and for the Southern District of California Southern Division. Hercules Gasoline Co., a corporation, Plaintiff vs. Graver Corporation Defendant Petition for Writ of Error and Assignment of Errors. Filed Apr 7 1926 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk. Wilbur Bassett Attorney at Law 432 Van Nuys Bulding Los Angeles, Cal. Attorney for.....

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HERCULES GASOLINE CO., a corporation, Plaintiff, vs. GRAVER CORPORATION, Defendant.	No. 1735-B Law. ORDER ALLOWING WRIT OF ERROR

Upon motion of Wilbur Bassett, Esq., attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered

herein and that the amount of cost bond on said writ of error be and hereby is fixed at Three hundred.

April 7, 1926.

Wm P James
District Judge

[Endorsed]: No. 1735-B Dept. Law In the U. S. District Court In and for the Southern Dist. of California, Southern Division. Hercules Gasoline Co. a corporation plaintiff vs. Graver Corporation defendant. Order Allowing Writ of Error. Filed Apr. 7 1926 Chas. N. Williams, Clerk By L. J. Cordes Deputy Clerk. Wilbur Bassett Attorney at Law 432 Van Nuys Building Los Angeles, Cal.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

HERCULES GASOLINE COMPANY, a corporation, Plaintiff, vs. GRAVER CORPORATION, Defendant.	No. 1735-B. BOND ON APPEAL The premium charged for this bond is $10.00 dollars per annum.

KNOW ALL MEN BY THESE PRESENTS:

That we, GRAVER CORPORATION, a corporation, as Principal, and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, as Surety, are held and firmly bound unto Hercules Gasoline Company in the sum of Three Hundred Dollars ($300.00) lawful money of the United States, to be paid to said Hercules Gasoline Company and its successors, for which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, as well as our successors, firmly by these presents.

Dated this 10th day of April, 1926.

WHEREAS, the above-named Graver Corporation has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of the Southern District of California, Southern Division, in the above-entitled cause;

NOW THEREFORE, the condition of this obligation is such that if the above-named Graver Corporation shall prosecute its said appeal to effect, and answer for all damages, costs and interest if it fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

GRAVER CORPORATION

[Seal] By Carroll Allen

Its Agent and Attorney.

FIDELITY & DEPOSIT COMPANY OF MARYLAND

[Seal] By Fred S. Hughes

Its Resident Agent and Atty in fact.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

On this 10th day of April, 1926, before me ELSIE E. ARMSTRONG, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared FRED S. HUGHES known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland and acknowledged to me that they sub-

scribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact.

[Seal] Elsie E. Armstrong

Notary Public in and for the State of California County of Los Angeles.

I hereby approve the foregoing bond. Dated the 14th day of April, 1926

Wm P James

Judge

[Endorsed]: No. 1735-B. In the District Court of the State of California in and for the County of Los Angeles Hercules Gasoline Company, Plaintiff & Respondent vs. Graver Corporation, Defendant & Appellant. Bond on Appeal. Filed Apr 12 1926. Chas. N. Williams, Clerk By L. J. Cordes Deputy Clerk. Carroll Allen Attorney at Law Stock Exchange Building Los Angeles, Cal. 875-777 Attorney for Appellant

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

HERCULES GASOLINE CO., a corporation,	)	
Plaintiff,	)	No. 1735-B Law.
vs.	)	PRAECIPE FOR RECORD.
GRAVER CORPORATION, Defendant.	)	

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. Complaint;
2. Demurrer to Complaint;
3. Order overruling demurrer;
4. Order removing cause from Superior Court of the State of California to the District Court of the United States;
5. Answer;
6. Demand for Bill of Particulars;
7. Bill of Particulars.
8. Bill of Exceptions;
9. Findings of Fact and Conclusions of Law;
10. Judgment;
11. Notice of Motion for a New Trial;
12. Order Denying Motion for New Trial;

13. Opinion of Henning, J., on Denying Motion for New Trial;

14. All minutes of the Court and orders and decrees made in the case;

15. All certificates made by the Clerk of this Court with reference to the proceedings, rulings and decrees of the Court;

16. The petition for Writ of Error and plaintiff's Assignment of Errors, orders of the Court and the Judge in Chambers relating thereto;

17. The Undertaking on Appeal;

18. The Certificate of the Clerk to the Correctness of the Record on Writ of Error herein;

19. Writ of Error.

20. All endorsements;

21. Stipulation for Settlement of Bill of Exceptions.

Dated this.....day of March, 1926.

Wilbur Bassett
Carroll Allen
Attorneys for Plaintiff in Error.

[Endorsed]: In the U. S. District Court in and for the Southern District of California, Southern Division. Hercules Gasoline Co. plaintiff, vs. Graver Corporation, defendant. Praecipe for Record. Filed Apr 7 1926. Chas. N. Williams, Clerk By L. J. Cordes, Deputy Clerk. Wilbur Bassett Attorney at Law 432 Van Nuys Building Los Angeles, Cal.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

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HERCULES GASOLINE CO., a corporation,

Plaintiff,

vs.

GRAVER CORPORATION,

Defendant.

No. 1735-B Law.

CLERK'S CERTIFICATE.

- - - - - - - - - - - - - -

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 98 pages, numbered from 1 to 98 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, complaint, order for removal, demurrer, order overruling demurrer, answer, demand for bill of particulars, bill of particulars, minute order denying motion for new trial and to vacate judgment, minutes of the court, findings of fact and conclusions of law, judgment, motion for new trial and notice, bill of exceptions, stipulation for settlement of bill of exceptions, petition

for writ of error, assignment of errors, order allowing writ of error, bond on appeal and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to..... and that said amount has been paid me by the plaintiff-in-error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, and of our Independence the One Hundred and Fiftieth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4859.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

WILBUR BASSETT,
CARROLL ALLEN,
Attorneys for Plaintiff in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 4859.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

This case comes up upon writ of error in an action at law tried before Hon. Edward J. Henning, in which judgment was given for the plaintiff for fifteen thousand dollars ($15,000.00) as damages for alleged breach of contract.

The complaint sets out that defendant Graver Corporation of East Chicago agreed, upon production of certain evidence of title to an oil tank known as "Getty Tank No. 2," to ship certain steel products to the order of plaintiff Hercules Gasoline Company of Los Angeles in the aggregate value of thirty-six thousand dollars ($36,000.00), and agreed to accept as part payment

the aforementioned Tank No. 2 at an agreed price of twenty-seven thousand dollars ($27,000.00). The complaint goes on to allege that defendant refused to furnish steel products upon these terms or to accept Tank No. 2 at the agreed price of twenty-seven thousand dollars. Judge Henning found that the tank was only worth twelve thousand dollars, and decreed that Graver Corporation, the defendant, ought to pay the difference to the disappointed Hercules between the fancy value they put upon the tank for trading purposes and its real value.

The case turns mainly upon the question whether defendant ever made such a contract, and the main points raised have to do with the admission by the trial court of evidence offered for the purpose of charging the defendant with the acts of one Holland, who was said to be agent for the defendant.

The Court Erred in Not Sustaining the Demurrer of the Defendant Below to the Complaint.

We invite the court's attention to paragraph II of the complaint [Tr. p. 6], wherein plaintiff alleges a certain agreement in writing. Under the California practice this agreement may be stated *in haec verba* or according to its effect. The pleading sets out no agreement of plaintiff to do anything. There is no allegation that plaintiff agreed to order or purchase any goods unless this may be inferred from the loose reference to "steel products to be ordered by plaintiff." Defendant agreed to ship promptly as directed, and not later than August first, certain steel products, but there is no allegation

that plaintiff by the contract bound itself to order anything at any time or to produce any evidence of title.

Passing on, now, to the next paragraph of the complaint, we find no allegation of production of evidence of title to Tank No. 2, which is alleged as the basis of the contract.

The plaintiff says in this regard: "Despite the fact that plaintiff had theretofore produced due evidence of its having acquired title to said Graver Tank No. 2." This is not an allegation of production of title. It is a mere recital. There is no allegation, in other words, that there was any such "fact."

The salutary rule of the common law is still in force and requires that a pleading be definite, certain, and perspicuous. It is not sufficient to allege matters by way of innuendo or recital, but there must be such direct and positive allegations as would support a prosecution of perjury.

People v. Jones, 123 Cal. 299.

> "There was no direct allegation that Jones was the agent, or acted as the agent, of the Kamplings, but such agency is alleged by way of recital only, if alleged at all. If it was material to Long's complaint that he should clearly allege that Jones was the agent of the Kamplings, and as such agent negotiated the transfer alleged, the complaint, so far as set out in the indictment, failed to do so, and of course the indictment which recites the allegations of the complaint, also failed in that particular. There was, therefore, no material issue tendered as to Jones' agency. Direct and positive averments of the fact cannot be supplied by any intendment or implication,

and where stated argumentatively or by way of recital or inference it is insufficient. (People v. Dunlap, 113 Cal. 72.) This rule applies even to civil actions. (Denver v. Burton, 28 Cal. 549; Stringer v. Davis, 30 Cal. 318.)"

McCaughney v. Schutte, 117 Cal. 223.

"The complaint here is argumentative, that is to say, the affirmative existence of the ultimate fact is left to inference or argument. Such pleading was bad at common law and is none the less so under our code system. To uphold such a pleading is to encourage prolixity and a wide departure from that definiteness, certainty and perspicuity which it is one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect except to encumber the record with verbiage and enhance the cost of litigation."

Burkett v. Griffith, 90 Cal. 532.

"Argumentative pleading is no more permissible under the code than it was under the common law. Matters of substance must be alleged in direct terms and not by way of recital or reference."

We submit that the general demurrer should have been sustained for lack of any allegation that plaintiff ever produced evidence of title to Graver Tank No. 2 or that plaintiff was ready or willing to perform any terms or conditions of its agreement, these matters being referred to only in recital.

We submit, also, that the complaint is fatally defective as against special demurrer in failure to allege any facts upon which substantial damages could be predicated. Assuming for the moment that the contract and breach

had been sufficiently alleged, there is nothing upon which to predicate more than nominal damages. Our special demurrer should have been sustained.

Philip v. Durkee, 108 Cal. 300.

This is an action for damages for breach of contract to purchase certain iron work. It was alleged that defendant refused to accept delivery and that by reason thereof plaintiff had suffered damages. The court said (p. 302):

> "The demurrer was not only upon the general ground of insufficiency of facts, but also for uncertainty, charging that it is uncertain upon what grounds plaintiff seeks to recover in this action, and in what the alleged damages consist of, or in what manner plaintiff has been damaged, or as to what is the value of said gates, lamps and material. The complaint, treated as in an action for the price of the goods, is insufficient, because there is no averment of delivery or offer to deliver sufficient to pass the title to Durkee.
>
> "Considered as an action for damages for a breach of the contract, it does state a cause of action, but, as such, it is obnoxious to the objections raised by the special demurrer. It is uncertain as to what the damage consisted of, or as to the extent of the damage."

The judgment was reversed and the cause remanded, with directions to the trial court to sustain the demurrer.

So in the case at bar the contract is one for a staple commodity at its market value, with an alleged trade of a staple commodity in part payment. Repudiation of such a contract leads to no general damages, and if

there are any special damages they have not been pleaded. The demurrer was well taken and it was error to overrule it.

The Court Erred in Not Sustaining the Motion for Non-suit at Close of Plaintiff's Case.

Upon the conclusion of plaintiff's case, we moved [Tr. p. 73] for nonsuit and demurred to the evidence on the ground that plaintiff had not proved the essential allegations in its complaint, and on the further ground that it did not appear that the contract alleged was ever executed so as to bind defendant. At the same time we moved to strike out matters read from depositions and exhibits which plaintiff had offered to connect and which the court had admitted in evidence subject to such connection. These motions were made together and are covered by plaintiff's exceptions Nos. 13 and 14. In support of our contention that plaintiff had not proved any case, we invite the court's attention to the evidence [Tr. p. 31 *et seq.*], from which it appears that plaintiff below offered its main testimony by the reading of certain parts of depositions taken in Chicago, which showed merely that one Holland, a broker in Los Angeles, had entered upon certain negotiations leading up to the contract in suit. The question was whether Holland ever had authority to bind the Graver Corporation by his signature to a contract. We suggest that a perusal of the correspondence set out in the exhibits nowhere supports any authority to Holland to sign contracts. The manager of the tank sales department said [Exhibit 6, Tr. p. 33] he would not "enter into any arrangement until we were better known to each other." This letter

was offered to prove agency, and the court, upon our objection, said [Tr. p. 35]: "It will be received for what it is worth. Of course, it is not proof of agency, but it tends in that direction." Later he wrote [Tr. p. 35]: "We informed you some time ago by telegraph that we are not interested in a trade and regret, therefore, to advise that the approval of the contract is not in order. We will be willing to accept the Hercules order only on our regular term basis, involving in no way, however, the Getty tank." The court will note that the contract at bar is here spoken of as "the Hercules supposed contract," and that the defendant offered to entertain not a contract, but an "order," and in the telegrams following, the Graver Corporation continues to refer to the transaction as an order; thus the wire to Getty [Tr. p. 41] directly speaks of an order. The court admitted this wire, although it was irrelevant, "subject to being connected with the transaction." This connection was never made and our motion to strike should be granted.

Plaintiff then introduced Exhibit 79 [Tr. p. 43], which appears to be an order to Holland, supposed to represent Graver. This, also, the court perceived to be irrelevant, and received it only subject "to being connected up." [Tr. p. 44.] Your Honors will note that this order, together with the account [Exhibit A, Tr. p. 45], do not bear upon the contract alleged, but concern a purely collateral deal with Getty.

Plaintiff then sought to show by C. R. Bird, superintendent for plaintiff, that Holland had signed a contract [Tr. p. 62], and had exhibited a letter giving him

authority to sign it on behalf of defendant: "This letter was a long one and I did not see all of it. The gist of the part that I saw was that Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation, particularly the settlement of the tank deal with Getty." Later, upon cross-examination, he admitted, "It was so far away from me I couldn't read it." [Tr. p. 81.] Plaintiff then called Holland, who testified that he had no such letter; that he did not recall ever seeing any such letter.

Thereupon, H. P. Grimm testified [Tr. p. 59] that he was present and saw a letter "tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with a signature on." Upon cross-examination he said he did not recognize the signature.

Andrew Mattei, treasurer for defendant, also testified about Holland's letter of authority. He says [Tr. p. 71]: "Bird and Grimm were skeptical about Holland's authority. He produced a letter with Graver Corporation printed on it at the head, and folded it over and showed the lower portion. The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles." Upon cross-examination: "We asked for additional evidence of Holland's authority. We went down to the bank to obtain this, but the gentleman at the bank was not in and we never went back—I could not verify the signature of Mr. Graver. I never talked to Mr. Graver about this letter having been shown me and did not ask him if such a letter was authentic."

Plaintiff then introduced certain evidence of value and rested.

We thereupon moved to strike out the evidence which had not been connected as required by the court's order, and demurred to the evidence and moved for nonsuit.

We submit that it was error to refuse this nonsuit if plaintiff had failed to establish any essential averment of his complaint. The most important of these was that plaintiff and defendant entered into an agreement in writing. The agreement proved was executed by Holland, and we submit that there was no competent evidence of Holland's authority. The contract was required to be in writing. "An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars." C. C. Cal. 1624 and 1739. "The provisions of section seventeen thirty-nine apply to all exchanges in which the value to be given by either party is two hundred dollars or more." (C. C. Cal. 1805.) Therefore, Holland's authority could not be established by parole.

C. C. Cal. 2309:

> "Authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Seymour v. Oelrichs, 156 Cal. 782:

> "The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parole evidence."

If it could be said that the transcript discloses any authority, it was restricted to taking orders and forwarding them, and such an agent cannot bind his principal without acceptance.

> "Where the principal has bestowed a restricted authority, or has openly fixed the limits of the authority, the agent's sales on terms not warranted by the authority do not bind the principal, unless with notice of the agent's acts he approves and accepts them."
>
> 2 C. J. 598.

Even if Holland had been granted authority to sell, it would not support an agreement to purchase a second-hand tank as part of consideration.

> "As a general rule, the sale must be for cash only, and, in the absence of special authority, mere authority to sell does not give the agent authority to sell on credit, and such an agent cannot bind his principal by receiving payment in bonds, notes, or other paper. A sale contemplates a price in money, and hence authority to sell confers power to sell for cash, but not to exchange for other property, or for part property and part cash."
>
> 2 C. J. 599.

We think it evident, then, that plaintiff must prove that Holland had authority in writing, and that that authority either was unlimited or, if it was limited, that it authorized the purchase or acceptance in trade of this second-hand Graver tank for twenty-seven thousand dollars, which Hercules now affirms was only worth twelve thousand dollars. We submit that there was no evidence of written authority and that the attempt to show that such authority had existed at some time did not succeed. We have shown that Holland testified that no such letter had existed, and it appears from the transcript that the testimony of the Gravers was taken

in Chicago, and a great volume of correspondence attached to the depositions. If there is anything in that correspondence which supports plaintiff in error, we ask why such letters were freely given upon deposition, when one other letter has left no trace in anybody's files. We ask Your Honor to scrutinize the testimony of Bird and Grimm, who were "skeptical about Holland's authority," and who now talk about a letter which they saw at a distance, folded in such a way that only the last paragraph could be seen, and signed by someone whose signature they could not recognize. After this incident they were still "skeptical," and went to Holland's bank for information, which they did not get. [Tr. p. 71.]

There was no competent evidence at the close of plaintiff's case to support the allegations:

1. That there was any contract between the parties;
2. That plaintiff had ever produced to defendant "due evidence" or any evidence whatsoever of title to Tank No. 2;
3. That there had been any breach of contract;
4. That plaintiff had suffered any injury.

The Court Erred in Admitting Exhibit 6.

[Tr. p. 32.]

"EXHIBIT 6.

February 11th, 1924.
(Dictated February 9th)

Mr. S. Reid Holland,
819 Stock Exchange Bldg.,
Los Angeles, California.
A. A. Butler:

In explanation of the various wires that have been sent you, I beg to give you the following explanation:

Before proceeding I wish to advise that this matter has been analyzed in detail to Mr. P. S. Graver personally, who stated that he advised you that any arrangement he made with you personally while on his trip to your city was subject to detailed arrangements that would be made with you by the sales department at this end. It was my intention some time ago to write up a contract under which you were to operate, but did not feel, in view of the short space of time that we were known to each other, that we should enter into any arrangement until we were better known to each other, which is one that I have been following out in all of my sales plans.

Regarding the Getty proposition; as explained in Mr. Phillips' wire of late January, we had at no time based our figures on any other plans, but that $580.00 per tank was the commission and that $750.00 per tank was your split on the erection. In view of that fact, therefore, as advised in that wire, your account had been credited with the amount of $580.00 on the first tank, plus the full split on the erection, but in view of the fact that only $18,000.00 had been received on the second tank only one-half of the commission should have been credited to your account. As mentioned in Mr. Phillips' wire, a sum in excess of this had already been credited and we, therefore, did not see the justice in your request asking for additional commissions.

As stated in Mr. P. S. Graver's wire of several days ago and in my night letter of yesterday, further commissions will, therefore, not be paid on the Getty account until the check for $9000.00, which you advised under date of January 30th would be sent us last week and which in a more recent wire you stated would be sent us this week, is received. Upon receipt of this check the balance of the commission due you will be sent, and upon receipt of a release from Getty on our contract

and a release from Abbott on the erection we will be willing to forward you our check for the amount due you on the erection.

Regarding that portion of your wire communication which spoke of our sending you balance due Abbott on the first Getty tank, wish to advise that it is our policy to make payments until releases are in our hands. We must either have Getty's acceptance of the first tank, or his release of us from the balance of the erection of test before this amount can be paid.

Your last wire requests that we honor your draft for 60% of the draft that we had recently made on the Western Refinery proposition. As previously advised, paying commissions by drafts is not an acceptable procedure and must be discontinued. I, therefore, advised you that when we received notification from our bank that the moneys covering our draft is in their hands check covering the commissions due will be sent you.

I don't want you to feel for a minute that I am taking an arbitrary stand in this matter. All of our agents are handled in a like manner, and in view of the fact that we have been universally successful in our arrangements with them I can see no reason whatsoever why the same sort of an agreement should not be acceptable and work satisfactorily in your case.

Yours very truly,

Manager Tank Sales.

Mr. McComb: We are offering that letter for that statement, to show that there was an agency.

Mr. Bassett: To which we object on the ground it is equivocal and remote; that it doesn't tend to show that this man has been treated, will be treated, or ever has been treated, as an agent, or, if he was, whether it

was a general agency, a special agency, a mere authority to send in offers, or what it is. This court certainly will not gamble upon an equivocal statement of that sort, which is merely a part of a letter, which says, 'We have treated our agents in a certain way.'

The Court: The objection is overruled, and it will be received for what it is worth. Of course, it is not proof of agency, but it tends in that direction."

This ruling is typical of the fragmentary and borderline character of plaintiff's evidence. The purpose of the offer was "to show that there was an agency." The letter expressly refuses to "enter into any arrangement until we are better known to each other." The letter was offered as proof of agency and the court, holding it was not such proof, was in error in admitting it.

The Court Erred in Admitting Exhibits 102 and 103.

[Tr. p. 41.]

"EXHIBIT 102.

Graver Corporation
East Chicago, Indiana
August 24th, 1923.

Confirmation of Telegram
To Thompson Holland Co.,
820 Stock Exchange Bldg.,
Los Angeles, California.

Our damage five thousand yours to be added in view of possibility of securing additional business from Getty we are not inclined to take advantage of this situation and would recommend leniency on your part also.

GRAVER CORPORATION.

EXHIBIT 103.

Graver Corporation
East Chicago, Indiana

Confirmation of telegram August 25th, 1923.

To Geo. F. Getty,
536 Union Oil Bldg.,
Los Angeles, California.

Wired Thompson Holland night letter advising extent of damage if your order is cancelled please handle settlement thru them.

GRAVER CORPORATION.

The Court: It (Exhibit 103) will be received in the same way, subject to being connected with the transaction.

Mr. Bassett: To which we object on the ground that George F. Getty, to whom this wire was sent, is not a party to this action, nor is there any element in the issues in this case concerned with George F. Getty, and that it is incompetent, irrelevant and immaterial. Here is a wire to another person outside of this case.

The Court: It will be received subject to being connected with the transaction.

To which ruling defendant duly excepted."

These telegrams were not addressed to plaintiff, nor can they be said by the remotest inference to confer power to bind Graver by written contract. That was the purpose for which they were offered, and the trial court observed that they had no connection with the transaction, and received them only subject to such connection, which was never made.

The Court Erred in Overruling Defendant's Objection to Exhibit No. 79 as Irrelevant.

[Tr. p. 43.]

"EXHIBIT 79.

Office Order

7/27/23

S. Reid Holland
820 Stock Exchange—Los Angeles, Calif.
Representing—
Graver Corp.
East Chicago, Ind.

Deliver to George F. Getty

Destination to be given later via Santa Fe.

Freight paid to destination by you; we to pay hauling charge from railroad to base.

2 80,000 Bbl—All Steel
Tanks—Gas tight 36,000.00 each

18,000.00 to be paid on completion of tanks and satisfactory tests have been made.

Erected on our property complete for 36,000.00 each, me to make grade and painting to be extra and me to furnish water for listing.

Bal. of 18,000.00 when oil is sold, time not to exceed 1 year.

Interest at 7%.

Tanks to be shipped from Chicago in from 7 to 10 days from receipt of order at *Each* Chicago.

(signed) GEORGE F. GETTY
by H. B. Gordon
Order No. 1323.

To which offer defendant objected upon the ground that it was irrelevant and merely an order, which objection was overruled.

The Court: It will be received subject to being connected up."

This exhibit set out in detail an office order from one Getty, who was not a party, addressed to Holland, described as representing "Graver Corp.", and we submit that the utmost that it showed is that at some time plaintiff in error had received through Holland a certain order from a third party. This order might have been submitted to any solicitor, but cannot have the least tendency to show that Holland had at that time any authority in writing to bind Graver by written contract. This is the purpose for which it was offered and it tended to prove quite the opposite, to-wit, that he was a mere vehicle. The trial court observed that it had no connection with the case and should have sustained the objection.

The Court Erred in Admitting Exhibit "A".

[Tr. p. 45.]

This exhibit was unsupported and unsigned, being a mass of dates and figures referred to as being "Defendant's Exhibit A." The court will note that this was offered by plaintiff and is not an exhibit for defendant; that it is said to have been attached to a deposition, but this part of the deposition was offered by the plaintiff below out of a mass of office files attached to the deposition. Plaintiff below having offered this part of the deposition of Graver, he is their witness, and not ours. (C. C. P. Cal. 2022; Wigmore on Evidence, Sec. 912.) The evidence offered was without connection, support or relevance, and the objection should have been sustained.

The Court Erred in Overruling Objection to Admission of Exhibit No. 10.

[Tr. p. 49.]

"EXHIBIT No. 10.

February 21, 1924.

Mr. S. Reid Holland,
820 Stock Exchange Building,
Los Angeles, California.
Dear Sir:

A nine thousand dollar check from George F. Getty, accompanied by your draft for eight hundred and eighty-six dollars and thirty cents, the balance commission due you on this account, received by our bank today.

We are not very well pleased with the way you have handled this item. Evidently you do not realize the various conditions attached to this contract. In the first place, the two tanks were sold to Getty based on half cash, balance within one year's time, and on my visit out there an amended contract was drawn up by myself, which Getty was to sign, and this provided the detail very clearly so that there would be no controversy over the contract when the provisions were lived up to.

After the first tank was finished and Getty did not desire to go ahead with the second tank, this left Abbott having a claim against our company for an adjustment on the erected price of the two tanks. It also left Getty with a claim on us in case of the first tank leaking to make it good. This is the reason we do not want to pay Abbott the entire amount for the first tank, as he has spent no money for testing the tank, and he should not receive the balance until the tank was tested and accepted or Getty released us from all claims and paid us the balance due us. You made a number of promises, that Getty would mail the amended contract to us, and

later a check would be mailed to us; not having received either, we were in no position to pay you the balance of your commission or to make any final advances to Abbott.

We wired you very clearly that on Getty's payment for the balance and a release from he and Abbott, we would send you your commission. We would not accept any drafts from you on this account. It seems that you were premature in drawing on us for this commission, this based purely on Getty's promise that he was going to give us a check.

Getty's check received today states on same 'Account tanks in full.' While this does not clearly define that he has no claim upon us, we believe we can accept it as closing his side of the contract. There remains now only Abbott to be settled with, and if Abbott will sign the release which Butler sent you, we will either mail him a check or let him draw on us for the balance.

Our stand in this matter may have looked arbitrary to you, but where a company like Getty, that has made so many promises, we have got to see the money before we are willing to pay out other money on account.

You had no right to tie our check from Getty up with your draft, as this check was the property of the Graver Corporation, and any time you feel that you cannot depend on what we tell you we agree to do, that is the time to quit doing business with our company. For your guidance in the future we will pay no commissions by sight draft. Whatever percentage of the total contract the customer pays on account, this will be your percentage against your total commission. Also, all customers' accounts are to be paid direct to us by the customer. This is our regular rule that is followed by all of our men. We have had entirely too much controversy

over these matters, and we have got to get down to business basis regarding these things.

Yours very truly,

GRAVER CORPORATION
Vice President.

The introduction of this was duly objected to upon the ground that it was incompetent, irrelevant and immaterial, and the objection overruled, to which defendant excepted."

This is a letter from Graver to Holland concerning a prior deal with Getty. It has no relation to the contract referred to. We assume that it was offered for the purpose of showing written authority to Holland to sign a contract with Hercules. This is the *sine qua non* for plaintiff's case, and we submit that this letter was utterly incompetent for this purpose, or for the purpose of proving any issue in this case. It is merely a desperate attempt of plaintiff to raise inferences of authority by showing that Graver knew Holland and had received orders solicited by him. Unless Your Honors think that this letter was sufficient authority in writing for the execution by Holland of the contract at bar with Hercules, under the doctrine of C. C. Cal. 2309 and Seymour v. Oelrichs, 156 Cal. 782, you will find that the admission of this evidence over our objection was error.

The Court Erred in Admitting Exhibit 11.

[Tr. p. 53.]

"Exhibit No. 11.

Western Union Telegram.

Los Angeles, Calif., Feb. 22, 1924.

Graver Corp.
East Chicago, Ind.

Demurrage at Wilmington goes to five dollars per car Monday stop understand from Florian that additional contracts have been forwarded why not come to California and thaw out Phil stop Gilmore tanks very unsatisfactory Kinghorne has recaulked every seam one tank and third test now being made on other one which has had bottom this kind of work is poor support for sales likewise delay on quotations Rush Hercules estimate stop was elected director yesterday mercury refinery which enables me to better protect our White Star interests.

S. Reid Holland.

To which offer of Exhibit No. 11 defendant objected on the ground that the same was incompetent and immaterial.

The court admitted this evidence subject to being connected up; to which ruling defendant duly excepted."

This is a telegram from Holland to Graver, and we suggest that it is on the same footing with the prior attempt to show Holland's authority. There is no issue in the case to which it is pertinent, and the trial court recognizing that it had no connection with the case, admitted it "subject to being connected up." This was never done and upon the face of the telegram could not be done.

The Court Erred in Admitting Exhibit 38.

[Tr. p. 54.]

"EXHIBIT No. 38.

Graver Corporation

To Graver Corp., March 14th, 1924.

Attention P. S. Graver, Vice-Pres.

Address East Chicago, Ind. File No. #102

From S. Reid Holland Geo. F. Getty Co.

Dear Sir:

Without reviewing too much detail, the contract which you revised and left with Mr. Paul J. Getty was followed up consistently and often by yours truly and I made some fifty-seven trips and then some to the Getty office in an effort to have this matter closed, but the general circumstances surrounding affairs and principally Mr. Getty's illness and the fact that the organization became internally disorganized resulted in a general buck passing contest. The situation has somewhat cleared itself and as I stated in a recent letter the Getty affairs are being incorporated as the George F. Getty Company with the senior as president and the son, Paul Getty, vice president and general manager. Various resignations have taken place and Paul Getty has hopes of making a good organization out of what is left. He was criticised pretty generally for buying the 80s altho as a matter of fact he voluntarily admits if he had bought the 10 when we first talked of them and filled them with cheap oil, that was then available, they would have paid for themselves long ago and he would have been way ahead, however that opportunity is passed.

Tank #2 stands an empty monument and they have nether oil nor water to even test it and there was little likelihood of their having any need for Tank #2 as their drilling campaign in Torrance constituting some ten or twelve wells has not panned out as yet and there was

every possibility of their standing us *oof* indefinitely, that is, unless we wanted to force settlement on Tank #2.

The Hercules Gasoline Company which is quite an active and growing concern needed production and a proposition was worked out early in February whereby Getty was to furnish them crude along certain favorable lines for a period of five years and in consideration for the favorable price, Hercules agreed and did purchase tank #2 and at this writing it is their property. I agreed with Getty as per the enclosed contract that I would help him clear the decks and get out without loss which he naturally appreciates, and you will note that there is no mention of any subsequent test on tank #1. In fact, the question did not come up, but I am still holding Abbotts check which was sent to me awaiting a letter which he is preparing guaranteeing to make good any leaks that we may be called upon to take care of. This is only a precaution on my part to take care of future contingencies. I have been obliged to hold out on you apparently on this transaction principally for the reason that Bird of a Hercules Company has changed his specifications several times and at the outset he did not want the equivalent in tonnage until sometime in July. You will note from the details which I am enclosing you in another letter on the Hercules transaction that there is ample margin for me to protect you against loss in disposing of Tank #2. I had in mind utilizing it on the Western job which I will write about in another letter, and had the diameters change on the 55's for that particular reason.

If this Hercules transaction meets with your approval, I will work out a disposition of tank #2 that will be satisfactory.

At this writing the Western contract has been partially disposed of. Two of the 55's were let yesterday to the

Western Pipe and Steel Co., and the other four will be refigured as I will explain in another letter.

In addition to this possibility of turning tank #2 promptly, and in connection with my letter of this date relative to White Star, if agreeable to you I would like to utilize Getty Tank #2 as a complete tank for #3 on the White Star job providing, however, that they will take care of the payments on Tank #2 as indicated in my letter of this date and be in a position to take care of the obligations on Tank #3, which would obviate the necessity of shipping any more steel from Chicago right away but would give them the tank #3 within the next sixty days. In either event, Getty will handle the transportation of tank #2. Please bear in mind that in endeavoring to work out this solution I had in mind the final settlement for you on the Getty account and I feel that the transaction with the Hercules Company will be a good one for us, as they are going to need considerably more equipment and storage. At this writing I am waiting your final figures and will probably write you during the day giving you all the facts relative to the Hercules matter.

I trust I have made myself clear and that this meets with your approval.

Yours very truly,

(Signed) S. Reid Holland."

To the introduction of which defendant objected upon the ground that the same was incompetent, irrelevant and immaterial. The objection was overruled. Defendant duly excepted.

This is a letter from Holland to Graver and could not, therefore, under any circumstances operate as proof of written authority from Graver to Holland. We think it clear that nothing short of written authority satisfies

the statute of frauds. The agent's writing was incompetent to prove anything, and our objection should have been sustained.

The Court Erred in Admitting Those Portions of Exhibits 16, 37, 39, 138, 139, 142, 144, Which Showed the Head of Certain Office Stationery.

[Tr. p. 58.]

Plaintiff here offered Defendant's Exhibits 16, 37, 38, 39, 138, 139, 142 and 144, as to that portion of those exhibits which contained on the stationery of S. Reid Holland the following: "Graver Corporation, inter office correspondence, Date, File No. To, Address, From." To which evidence the defendant objected on the ground the same is incompetent, irrelevant and immaterial. The objection was overruled and the evidence admitted subject to being connected, to which ruling defendant duly excepted.

Plaintiff below being unable to show any written authority to Holland to sign contracts on behalf of Graver Corporation, sought to raise an inference of such authority by showing that certain stationery which Holland had used had written upon it "Graver Corporation, Inter-office Correspondence, Date, File No. 2, Address, From." We submit that at the utmost this can only show that Holland assumed whatever relation these words signified. Nothing that he could do could make him Graver's agent as against the statute of frauds, nor could Graver by any means be estopped by claims or assertions made by Holland. The trial court clearly recognized that the testimony was irrelevant and incom-

petent, and admitted it only "subject to being connected." We think the ruling was error and we point out that our subsequent motion to strike should have been granted.

The Court Erred in Overruling Objection to the Question, "Did You Have Any Conversation With Mr. Holland Regarding His Authority to Represent the Graver Corporation?"

[Tr. p. 61.]

We have always considered it elementary that an agent may not establish his own authority.

Ferris v. Baker, 127 Cal. 520:

> "We leave out of view any declarations of E. N. Baker as to his agency for his wife; they were incompetent to establish the fact of agency against her."
>
> "Agency cannot be proved by the declarations of the agent."
>
> Patterson v. Stockton and Tuolumne Railroad Company, 134 Cal. 244.

People v. Dye, 25 Cal. 108:

> "The fact, therefor, which was sought to be shown was not proper for the consideration of the jury; but if it had been, the mode of showing it was improper. It consisted in proving that at the time she demanded the money Mrs. Dye said that her husband had sent her to do so. There was no other evidence of the fact beyond such declaration. But any rogue may use the name of an honest man to facilitate his roguery. It is well settled that the mere declaration of the alleged agent is not evidence of the agency."

We submit that no conversation with Holland regarding his authority could be admissible to prove that authority as against the requirements of the statute that such authority be in writing. The question was clearly incompetent and the objection should have been sustained.

The Court Erred in Refusing to Strike Out Evidence of Bird Concerning an Alleged Letter From Graver to Holland.

[Tr. p. 66.]

Holland being called by plaintiff, testified: "I am the Holland referred to in these agreements. I do not have the letter that Mr. Bird refers to and never did have it. I have looked every place where I ordinarily place letters and do not recall ever seeing any letter of that description." Whereupon the plaintiff renewed its objections to any evidence regarding said letter and moved to strike out evidence regarding the same. This objection was overruled and motion denied, and defendant excepted.

We have shown in the prior exception that Bird, who was superintendent for Hercules, was asked if he had any conversation with Holland regarding his authority and was allowed over our objection to testify as follows:

"In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on Graver letterhead, signed 'Graver Corporation by W. F. Graver.' This letter was a long one and I did not see all of it. The gist of the part that I saw was that Holland had full authority to transact any business in Los

Angeles on behalf of Graver Corporation, particularly the settlement of the tank deal with Getty." [Tr. p. 61.]

Your Honors will note that at this time, in the midst of Bird's testimony, he was excused from the stand and Holland put on in a vain effort to establish this supposed letter. It is perfectly evident that parole evidence concerning this letter was not admissible under our practice. This is not a case where notice to produce would authorize secondary proof, because Holland was not an adverse party.

C. C. Cal. 1938:

> "If the writing be in the custody of an adverse party, he must first have reasonable notice to produce it."

The only manner in which this letter could be proved by secondary evidence was by first making proof of its loss, and then proving its due execution, together with a copy or a recital of its contents.

> "The original writing must be produced and proved—if it has been lost, proof of the loss must first be made before evidence may be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy or by recital of its contents in some authentic document, or by the recollection of a witness, as provided in section 1855."
>
> C. C. P. Cal. 1937.

We submit that none of these elements appear. In other words, there was no proof of loss; no proof of due execution; no offer of any copy; no recital of contents

in any authentic document; and no recollection of any witness who had seen more than a part of this supposed letter.

Byrne v. Byrne, 113 Cal. 291.

In this case the trial court allowed a witness to testify her conclusion as to the contents of a letter. The court said:

> "The admission of this evidence was palpable error. The witness is asked both by court and counsel to testify to the contents of a letter without any foundation of proof of loss for the introduction of such secondary evidence. Moreover, her answers themselves do not fairly state the contents, but, under leading questions from her counsel, she was permitted to give her own judgments and conclusions as to the meaning of the contents of the letter."

Agency in law is not a matter of words, but a legal conclusion from the authority conferred. It is for the court and not for a witness to determine whether any secondary evidence tends to show agency. Bird did not tell the court the contents of any part of the letter, nor did he even see the entire letter, but undertakes to say that "The gist of the part that I saw was that Holland had full authority." We submit that this was purely a conclusion of the witness and did not tend in any respect to establish the document as authority from Graver to Holland. But quite as serious objection can be raised to the failure to prove the signature of Graver. There is nothing to show that the witness knew the signature of Graver or that he recognized or identified it. He admits he did not know the signature. [Tr. p. 70.]

"I never saw any of the Gravers; I don't know that I ever saw any of their signatures except on a contract between Paul Getty and the Graver Corporation. This letter I refer to was signed by Graver, but I do not recognize the signature. The name of Graver appeared there, that is all."

But even if he had established the signature, he should not have been allowed to testify to the effect of a writing only part of which he had seen.

> "By the principle of completeness it is regarded as unsafe to listen to any testimony of the contents of a lost writing unless that testimony purports to reproduce at least the substance of the contents, and some courts even require the fairly complete detail of its contents."
>
> Wigmore on Evidence, Sec. 1957.

The Court Erred in Admitting Testimony of Grimm to a Conversation Between Bird and Holland as to Holland's Authority.

[Tr. p. 69.]

Question: "Did you hear a discussion between Mr. Bird and Mr. Holland as to Holland's authority to sign these contracts?"

Answer: "Yes, sir."

Question: "What was said?"

This was objected to as incompetent, irrelevant and immaterial, and the objection overruled. This ruling is on the same footing with the ruling in regard to the testimony of Holland on the same (*supra*), and we renew the objections stated above to the admission of any statements of Holland as to the existence or extent of his authority.

The Court Erred in Refusing to Strike Out the Testimony of Grimm That a Letter Had Been Shown Him by Holland "Tending to Show Holland Had Authority to Act for Graver Corporation."

[Tr. p. 69.]

This is the answer to the question set out in the foregoing exception and permitted over our objection.

The witness says:

"Bird questioned Holland as to whether he had authority to act for the Graver Corporation. Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery, signed by one of the Gravers, tending to show Holland had authority to act for the Graver Corporation." [Tr. p. 69.]

Testimony as to the contents of this letter was objected to on the ground that same was incompetent, irrelevant and immaterial, and without foundation, and the exception overruled.

We submit that the statement of what the letter tends to show is purely a conclusion, and that the witness was permited to usurp the province of the court, as this answer was purely a conclusion of law. The witness did not pretend to know the signature to the letter, nor to whom it was addressed, nor the contents, yet the trial court permitted him to state his conclusion of law as to its effect. We submit that the ruling was palpable error.

It is immaterial what part of an adverment may say, as it must be taken as a whole or not at all.

The Court Erred in Refusing at the Close of Plaintiff's Case to Strike Out Testimony Received Conditionally, Subject to Being Connected or a Foundation Laid.

[Tr. p. 93.]

We recall that plaintiff was endeavoring to establish written authority authorizing Holland to act for Graver. For this purpose they offered various letters and conversations, none of which purported to constitute such authority. The trial court evidently thought they were suffering from some sort of impediment and would in the course of time come to the point. He adopted a benign and not unheard-of practice of admitting the testimony tentatively, subject to a later showing that it had something to do with the case. For example, the letter of February 11, Exhibit 6 [Tr. p. 32]:

"Mr. McComb: We are offering that letter for that statement, to show that there was an agency.

Mr. Bassett: To which we object on the ground it is equivocal and remote; that it doesn't tend to show that this man has been treated, will be treated, or ever has been treated, as an agent, or, if he was, whether it was a general agency, a special agency, a mere authority to send in offers, or what it is. This court certainly will not gamble upon an equivocal statement of that sort, which is merely a part of a letter which says, 'We have treated our agents in a certain way.'

The Court: The objection is overruled, and it will be received for what it is worth. Of course it is not proof of agency, but it tends in that direction."

To which ruling defendant duly excepted.

Later the telegram, Exhibit 103 [Tr. p. 41], was received in the same way, "subject to being connected with the transaction."

Again, when the office order [Tr. p. 43] was offered, the court received it "subject to being connected up."

Exhibit No. 11 [Tr. p. 53] was admitted "subject to being connected up," and, indeed, all of the evidence of plaintiff regarding letters and conversations concerning the agency were incompetent and irrelevant, and were admitted by the court in the hope that before the close of plaintiff's case he would show their foundation and connection with the issues. We submit that this showing never was made; that there was no pretense or testimony of any witness to any original or secondary evidence establishing that defendant below had ever executed any written authority to Holland to execute the contracts sued upon. The testimony having been admitted subject to connection, and connection not having been made, motion should have been granted, and its denial was reversible error.

There Is No Evidence to Support the Finding of the Court That Plaintiff and Defendant Entered Into a Certain Agreement in Writing.

[Tr. p. 23.]

We have already shown that plaintiff did not establish any authority in Holland prior to the motion for nonsuit. We submit that no evidence was ever subsequently submitted to show any such authority. Bird was again called in the rebuttal and said in regard to the supposed letter of authority:

"It was so far away from me I couldn't read it, but that portion I did see was the last paragraph. It seemed to be a business letter signed 'Graver Corporation by W. F. Graver.' The Graver Corporation name was typewritten. I don't remember the wording, but the gist of it was that Holland was their authorized agent. I never asked to see the letter again and I don't know to whom it was addressed or the date of it." [Tr. p. 81.]

Grimm was also recalled in rebuttal and said:

"Mr. Bird questioned Holland about his authority to act for Graver and Holland made some remark, 'Let them go over to the bank to satisfy them.'"

We recall here that Grimm and Bird went to the bank, but found nothing. We submit that there was no competent evidence on which the court could find that Holland had written authority from Graver to sign the Hercules contract, and without such proof the finding must fail.

There Was No Evidence to Support Finding III That Plaintiff Had Theretofore Produced Due Evidence of Its Having Acquired Title to Said Graver Tank No. 2.

[Tr. p. 24.]

We respectfully suggest that the finding is informal in that it does not find that such was the fact, but if it was intended to be a finding that plaintiff had produced such evidence, there was no competent testimony to support it. The only testimony on the subject is the conclusion of Bird that Holland "saw the bill of sale which was handed to us." We submit that even if Holland had seen a paper handed to Bird, this is not competent

evidence to show that it was a bill of sale or that it conveyed title. Moreover, even if Holland had known that it was a bill of sale in the hands of Bird, there is no proof of production of "due evidence" to the Graver Corporation or even to Holland. The finding is without support and was an essential condition of the contract.

The Evidence Does Not Support Finding IV "That It Is Not True That Said Holland Executed Said Agreement Without Authority of Defendant, or That Said Holland at Said Date Did Not Have Authority or Right to Execute Said Agreement for or on Behalf of Defendant, or That Defendant Never at Any Time Ratified or Confirmed the Same."

[Tr. p. 25.]

This is the same question argued above. The court does not find that there was written authority, as put on issue by the answer, which we have shown is essential under the statute of frauds. We would suggest, also, that there is no evidence to support any ratification or adoption, which also is required to be in writing. C. C. 2310:

> "A ratification can be made only in the manner that would have been ncessary to confer the original authority to the act ratified."
>
> Cook v. Newmark Grain Company, 54 Cal. App. 283.

Plaintiff below tried to foist upon Holland a $12,000 tank for $27,000. When Graver refused to take second-

hand goods in trade or to accept any contract made by Holland or anything other than an order subject to acceptance, the disappointed Hercules Gasoline Company sought to realize upon the mythical valuation set upon their tank and force Graver to swallow the Holland contract. We submit that the trial court erred in every respect above set out and the judgment should be set aside and the cause remanded with instructions to sustain the demurrer.

Respectfully submitted,

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No. 4859.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR.

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REPLY BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The evidence shows the material facts in this case to be as follows: Defendant on or about July 27, 1923, sold to Geo. F. Getty of Los Angeles, two 80,000-barrel all steel tanks. [Tr. pp. 43, 45, 49.]

In February, 1924, one of the tanks had been erected and fully paid for. The other tank known as "Graver Tank No. 2" had not been erected, and Geo. F. Getty found that he did not have need for this second tank. He owed the defendant a balance of $9,000.00 on account of the purchase price of "Graver Tank No. 2" and was anxious to dispose of it. [Tr. pp. 48, 55, 64, 75.]

On or about February 7, 1924, S. Reid Holland, representing the Graver Corporation, C. R. Bird, representing the plaintiff, and H. P. Grimm, representing Geo. F. Getty, met in the office of Geo. F. Getty and two contracts submitted by S. Reid Holland, were executed. [Tr. pp. 60, 69, 70, 74.] One was a contract between defendant and Geo. F. Getty whereby Geo. F. Getty agreed to pay the balance of $9,000.00 due on "Graver Tank No. 2" to defendant and defendant released Geo. F. Getty from further liability on account of the purchase price of "Graver Tank No. 2", and agreed to enter into a contract with plaintiff, Hercules Gasoline Company, which was to provide for the sale of certain fabricated steel to plaintiff to be shipped on or before August 1, 1924. [Tr. pp. 63, 64.] Geo. F. Getty paid the $9,000.00 to defendant at the time the contract was executed. [Tr. pp. 45, 49, 70, 74.]

The other contract executed at the same time was between defendant and plaintiff. By its terms defendant agreed to ship to plaintiff not later than August 1, 1924, the equivalent in tonnage at prevailing prices of $36,000.00 of fabricated steel upon plaintiff's obtaining due evidence of having acquired title to "Graver Tank No. 2". Defendant also agreed to accept "Graver Tank No. 2" and to give plaintiff a credit therefor in the amount of $27,000.00, on account of the fabricated steel purchased by plaintiff from defendant. [Tr. pp. 62, 63.]

Plaintiff obtained title to "Graver Tank No. 2" and so advised defendant. [Tr. pp. 46, 56, 67, 68.] On or about April 4, 1924, defendant notified plaintiff that it would not be bound by its contract and repudiated the

same. [Paragraph 3 of Answer. Tr. pp. 14, 37.] Thereafter plaintiff sold "Graver Tank No. 2" to the Western Pipe and Steel Company for $12,000.00, which was the best price obtainable. [Tr. pp. 66, 72.]

A general and special demurrer was filed to the complaint and overruled by consent of counsel for the respective parties. [Tr. p. 12.]

At the close of plaintiff's case, defendant moved for a nonsuit and to strike out the exhibits offered in evidence by plaintiff, which motion was denied. [Tr. p. 73.] Thereafter, defendant introduced evidence on its own behalf. [Tr. p. 73, *et seq*:]

The District Court gave judgment in favor of plaintiff for $15,000.00, and costs. [Tr. p. 27.] It is from this judgment that defendant appeals predicating error on the District Court's rulings on, First: Defendant's demurrer (Opening Brief p. 4), Second: Defendant's motion for a nonsuit and motion to strike out evidence made at the close of plaintiff's case (Opening Brief p. 8), Third: Defendant's objections to the admission of evidence (Opening Brief pp. 13, 16, 18, 19, 20, 23, 24, 27, 28), and Fourth: The court's Findings of Fact II, III and IV (Opening Brief pp. 35, 36, 37).

Under the First heading defendant contends:

1.

That the District Court erred in overruling the general demurrer to the complaint in that:

A. There is not an allegation in the complaint of an obligation upon the part of the plaintiff. (Opening Brief p. 4.)

B. There is not an allegation in the complaint that plaintiff produced due evidence of having acquired title to "Graver Tank No. 2".

2.

That the District Court erred in overruling the special demurrer to the complaint in that the complaint did not contain an allegation of facts showing substantial damage to plaintiff. (Opening Brief p. 6.)

Under the Second heading defendant contends:

1.

That the District Court erred in overruling defendant's motion for a nonsuit made at the close of plaintiff's case in that:

There was no proof offered that S. Reid Holland was the agent of defendant (Opening Brief p. 9), and

There was no evidence that S. Reid Holland was authorized in writing to execute the contract between plaintiff and defendant. (Opening Brief p. 11.)

2.

That the District Court erred in not granting defendant's motion made at the close of plaintiff's case to strike out certain exhibits and other evidence introduced by plaintiff. (Opening Brief p. 8.)

Under the Third heading defendant contends:

1.

That the District Court erred in admitting in evidence the following exhibits: 6, 102, 103, 79, "A", 10, 11, 38, 16, 37, 39, 138, 139, 142, and 144. (Opening Brief pp. 13, 16, 18, 19, 20, 23, 24, 27.)

2.

That the District Court erred in admitting in evidence statements of S. Reid Holland regarding his authority to represent the defendant. (Opening Brief pp. 28, 32.)

3.

That the District Court erred in refusing to strike out evidence regarding the contents of a lost letter written by defendant to S. Reid Holland in that:

A. There was no proof of the loss of the letter.

B. There was no proof of the due execution of the letter.

C. There was no recital of the contents of the letter by a witness who recollected it. (Opening Brief p. 29.)

4.

That the District Court erred in permitting H. P. Grimm to testify regarding statements of S. Reid Holland about his authority to represent defendant. (Opening Brief p. 32.)

5.

That the District Court erred in refusing to grant defendant's motion made at the close of plaintiff's case to strike out testimony received conditionally subject to being connected, in that no testimony was ever offered establishing a connection or laying a proper foundation for its admission. (Opening Brief p. 34.)

Under the Fourth heading defendant contends that there is no evidence to support the finding of the District Court that:

A. Plaintiff and defendant entered into an agreement in writing. (Opening Brief p. 35.)

B. S. Reid Holland was authorized to sign the agreement on behalf of defendant. (Opening Brief p. 36.)

C. It is not true that S. Reid Holland was not authorized by defendant to execute the agreement sued upon. (Opening Brief p. 37.)

D. Plaintiff produced due evidence of having acquired title to "Graver Tank No. 2" in that the only testimony on the subject is the conclusions of C. R. Bird and S. Reid Holland. (Opening Brief p. 36.)

ARGUMENT AND AUTHORITIES.

FIRST.

1.

The Court Did Not Err in Overruling the General Demurrer to the Complaint.

A. The Complaint Contained an Allegation of an Obligation to Be Performed by the Plaintiff and Therefore Was Not Void for Lack of Mutuality.

(1) In the Complaint There Is an Express Allegation of Plaintiff's Obligation.

The complaint expressly alleges that plaintiff agreed to accept and pay for steel products of the value of $36,000.00. Paragraph II of the complaint reads in part as follows:

"That on or about February 7, 1924, plaintiff and defendant entered into a certain agreement in writing wherein and whereby *defendant agreed* by and with plaintiff that upon plaintiff producing due evidence of its having acquired title to a certain steel tank, described as Graver Tank No. 2, defendant would ship promptly

as directed and not later than August 1, 1924, steel products to be ordered by plaintiff of the aggregate price of $36,000.00 at prices prevailing at the date of shipment *which plaintiff agreed to accept and pay for at said price.*" (Italics ours.) [Tr. p. 6.]

(2) The Acceptance of an Offer to Sell Merchandise Implies an Agreement Upon the Part of the Purchaser to Pay for the Commodity.

T. W. Jenkins & Co. v. Anaheim Sugar Co., 247 Fed. 958;

Sterling Coal Co. v. Silver Spring Bleaching & D. Co., 162 Fed. 848;

1 Williston on Sales, 2nd Ed. p. 7, Sec. 5a;

1 Williston on Contracts, p. 154;

3 Williston on Contracts, p. 2341.

In the case of *Sterling Coal Co. v. Silver Spring Bleaching & D. Co.*, 162 Fed. 848, it was contended that the agreement was unilateral in that the defendant did not undertake to buy its consumption of coal from the plaintiff, but that the plaintiff simply promised to sell at specified rates if required. In denying the correctness of this position the court says in the course of the opinion at page 850:

> "We do not so construe the paper. It purports to embody an 'agreement' that the *plaintiff is to 'furnish'* the defendant with its entire consumption of coal. *This fairly imports that the defendant agrees to accept*, as well as the plaintiff to deliver, and that meaning is confirmed by the absolute requirement that the plaintiff should have 1000 tons constantly in the defendant's yard, and the further provision as to the 3000 tons." (Italics ours.)

In the case of *Lima Locomotive & M. Co. v. National Steel C. Co.,* 155 Fed. 77, at page 79, the court says:

> *"By the acceptance of the plaintiff's proposal, the defendant was obligated to take from the plaintiff all castings which their business should require.* The contract, if capable of two equally reasonable interpretations, should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties." (Italics ours.)

In the case of *T. W. Jenkins & Co. v. Anaheim Sugar Co.,* 247 Fed. 958, the Circuit Court of Appeals reversed the judgment of the District Court in sustaining a demurrer to the complaint on the ground of lack of mutuality. At page 961 this court quotes with approval from the opinion in the case of *Cold Blast Trans. Co. v. Kansas City, etc., Co.,* 114 Fed. 77, saying:

> "Indeed, the court said: '*An accepted offer* to furnish or deliver such articles of personal property as shall be needed, required or consumed by the established business of the acceptor during a limited time is binding and may be enforced, because *it contains the implied agreement of the acceptor to purchase* all the articles that shall be required in conducting his business during this time from the party who makes the offer.' Golden Cycle Manufacturing Co. v. Rapson, etc., Co., 188 Fed. 179, 112 C. C. A. 95; Sterling Coal Co. v. Silver Springs, 162 Fed. 848, 89 C C. A. 520." (Italics ours.)

B. There Is an Allegation in the Complaint That Plaintiff Produced Due Evidence of Having Acquired Title to Graver Tank No. 2.

(1) The Complaint Expressly Alleges That Plaintiff Had Produced Due Evidence of Its Having Acquired Title to Graver Tank No. 2.

In paragraph III of the complaint it is alleged:

"And despite the fact that *plaintiff had* theretofore *produced due evidence of its having acquired title to said Graver Tank No. 2,* and was ready and willing to perform each of the terms and conditions of said agreement upon its part to be performed * * *." (Italics ours.) [Tr. p. 6.]

(2) A Complaint Is Sufficient as Against a General Demurrer If the Essential Facts Appear Only Inferentially, by Way of Conclusions of Law or by Way of Recital.

Haskins v. Jordan, 123 Cal. 157;
Fuller Desk Co. v. McDade, 113 Cal. 360;
City of Santa Barbara v. Eldred, 108 Cal. 294;
Amestoy v. Electric R. T. Co., 95 Cal. 311 & 314;
Winter v. Winter, 8 Nevada 129;
1 Bancrofts Code Pleading, 369.

In *1 Bancrofts Code Pleading,* page 369, it is said:

> "A complaint is sufficient as against a general demurrer if the essential facts appear only inferentially, or by way of conclusions of law, *or by way of recital.*" (Italics ours.)

In the case of *Fuller Desk Co. v. McDade,* 113 Cal. 360 (45 Pac. 694), in ruling upon a general demurrer to

the complaint, the court says in the course of its opinion at page 363:

> "We think it must be held that such facts appear in the complaint here (Arzaga v. Villalba, 85 Cal. 191, 196, and cases cited); true, *rather by way of recital,* when they should have been alleged directly; *but the demurrers interposed by defendants do not include this fault among the grounds they specify,* and under the rule requiring objections based on such defects to be taken by special demurrer, we are not at liberty to treat the complaint as bad on that account. (San Francisco v. Pennie, 93 Cal. 465; Santa Barbara v. Eldred, 108 Cal. 294.)" (Italics ours.)

In the case of *City of Santa Barbara v. Eldred,* 108 Cal. 294 (41 Pac. 410), the appellate court in passing upon the sufficiency of the complaint as against a general demurrer says at page 297:

> "Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, *or by way of recitals, prevail on such demurrer."* (Italics ours.)

In the case of *Winter v. Winter,* 8 Nevada, 129, the court says at page 135:

> "The demurrer was therefore properly overruled. The complaint does state that the plaintiff was entitled to the water. It is true this allegation is *by way of recital,* but no such objection was specified in the demurrer, and *it is well settled that it can not be insisted upon under a general demurrer."* (Italics ours.)

Therefore, even though we concede for the purpose of argument, defendant's criticism that the allegations objected to in the complaint are *mere recitals* still they cannot be attacked by defendant's general demurrer.

2.

The Court Did Not Err in Overruling the Special Demurrer to the Complaint.

(1) In an Action for Breach of Contract an Allegation That Plaintiff Has Been Damaged in a Named Sum Is a Sufficient Allegation of General Damages.

Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553;
Long Beach City School District v. Dodge, 135 Cal. 401; 67 Pac. 499;
Summers v. L. F. S. Syndicate, 46 Cal. App. 250; 189 Pac. 286;
8 Cal. Jur., 888;
1 Bancrofts Pleading, 283.

In the case of *Summers v. L. F. S. Syndicate*, 46 Cal. App. 250 (189 Pac. 286), at page 253, the court says:

> "(2) Respondents claim that the complaint is uncertain in that it does not attempt to segregate the various items of damage according to the amounts of damage severally caused by the items stated constituting the various alleged imperfections in the buildings; that it merely fixes the total amount of damages without indicating the process by which the plaintiff arrives at that amount of damages. We think that the damages are alleged with sufficient particularity. In *Long Beach etc. District v. Dodge*, 135 Cal. 401 (67 Pac. 499), the action was to re-

cover on a bond given by the contractor for the construction of a high school building. The court held that it was not necessary to state in the complaint a cause of action as to each of the defects in the building on account of which the plaintiff sought to recover; that the Code of Civil Procedure, in section 454, has provided against surprise by requiring the plaintiff to furnish, when demanded in writing, a copy of the account; that the words 'the account' in that section include such damages as those stated in the case. (See, also, Jensen v. Dorr, 159 Cal. 742, 746 (116 Pac. 553).)"

In the case of *Long Beach, etc. District v. Dodge,* 135 Cal. 401 (67 Pac. 499), at page 407 the court says:

"It is contended that defendants had no means of determining from these allegations in what respect Lutge's work would be attacked or what evidence would be required on the part of defendants.

We think the demurrer was properly overruled. It certainly could not be necessary to state in the complaint a cause of action as to each of the defects in Lutge's work for correcting which the plaintiff sought to recover; but while permitting pleadings to be condensed and simplified in respect to such matters, the code has provided against surprise, by requiring the plaintiff to furnish, when demanded, in writing, a copy of the account, under the penalty of being precluded from giving evidence thereof. (Code Civ. Proc., Sec. 454.) This section uses the words, 'the account', but we think it includes such demands as are stated in this case. In *Barkley v. Rensselaer etc. R. R. Co.,* 27 Hun. 515, in speaking of section 531 of the Code of Civil Procedure of the state of New York, it is said: 'In ordinary language, the

word *account* is applied to almost every claim on contract which consists of several items.' We think it is so used under our code; and it is there expressly said: 'It is not necessary for a party to set forth in a pleading the items of an account therein alleged.' Appellants' contention is not that a cause of action for these items is not stated, but that they were entitled to an allegation 'which would have given them an opportunity in advance of the trial to ascertain the points upon which they would be called upon to make a defense.' This would lead to an unnecessary prolixity in pleading, which it was intended to avoid by giving a remedy under section 454 of the Code of Civil Procedure. That the demurrer was properly overruled, see *Wise v. Hogan,* 77 Cal. 184; *Pleasant v. Samuels,* 114 Cal. 34; *McFarland v. Holcomb,* 123 Cal. 84."

In *1 Bancroft's Pleading,* at page 283 it is said:

"It is a general rule that damages which naturally and necessarily arise from the breach of contract or other act complained of need not be stated, as they are covered by the general damages laid in the pleading, * * *."

In the complaint in paragraph III, it is alleged:

"Defendant stated to plaintiff that it would not receive or accept said Graver Tank No. 2 in part payment or in exchange for said steel products or allow plaintiff said credit of $27,000.00 therefor in part payment of said steel products and refused to furnish said steel products upon the terms stated in said agreement and repudiated and refused to abide by or perform said agreement, *all to plaintiff's damage in the sum of $19,200.00."* (Italics ours.) [Tr. p. 7.]

It is to be noted that in addition to the allegation of damage contained in the complaint plaintiff on demand of defendant furnished a bill of particulars, the sufficiency of which has never been questioned by defendant. [Tr. pp. 17, 18.]

The case of *Philip v. Durkee,* cited at page 7 of defendant's opening brief is not in point for the reason that in the case cited there was a *total absence* of *any allegation of damage even in general terms,* the court saying at page 302:

> "How much they are injured by the refusal of Durkee to permit them to complete the contract *is nowhere stated even in general terms.*" (Italics ours.)

(2) The Consent to the Overruling of a Demurrer Is a Waiver of Objections Raised by It.

Conniff v. Kahn, 54 Cal. 283;
Mecham v. McKay, 37 Cal. 154;
Carvell v. Cain, 16 Cal. 567;
Hansom v. Sherman, 25 Cal. App. 169; 143 Pac. 73;
Haley v. Nunan, 2 Cal. Unrep. 189.

At the time of the hearing of the demurrer to the complaint the District Court with the consent of defendant overruled the demurrer. Defendant is therefore concluded from claiming on appeal that it was error to overrule the demurrer. The following minute order was entered at the time of the hearing on the demurrer:

"This cause coming before the court at this time for hearing on demurrer; Attorney McComb of Messrs.

McComb & Hall appearing as counsel for the plaintiff, *pursuant to consent of counsel for the respective parties,* it is by the court ordered that the said demurrer be and the same is hereby overruled * * *." (Italics ours.) [Tr. p. 12.]

In the case of *Conniff v. Kahn,* 54 Cal. 283, at page 284, the court says:

> "The complaint was demurred to on the grounds, 1st. That it did not state facts sufficient to constitute a cause of action; and 2nd. That it was ambiguous, unintelligible, and uncertain. The order overruling the demurrer is as follows: 'On motion of plaintiff's attorneys, *defendant's attorney consenting thereto,* ordered, that the demurrer to the complaint herein be and the same is hereby overruled, with leave to the defendant to answer in ten days.' In his points and authorities, the counsel for appellant insists that the demurrer should have been sustained. If he had not consented to its being overruled, it would be the duty of this court to consider that point. As it is, we cannot regard it as before us on this appeal."

In the case of *Haley v. Nunan,* 2 Cal. Unrep. 189, defendant attempted to have reviewed on appeal the order overruling a general demurrer to the complaint. At page 189 the court said:

> "Upon motion of defendant's attorney a *general demurrer to the complaint* was overruled, with leave to answer. Yet it is now contended that the court erred in overruling the demurrer. But where a demurrer has been overruled at the request of the demurring party, he will not be heard, on an appeal from the judgment entered in the case, to question

the correctness of the ruling: Coryell v. Cain, 16 Cal. 568, Mecham v. McKay, 37 Cal. 154." (Italics ours.)

In the case of *Carvell v. Cain,* 16 Cal. 567, at page 572, the court says:

"The objections raised by the demurrer we do not notice, as the demurrer was overruled by *consent* of parties. A ruling made by consent cannot be the subject of consideration in this court." (Italics ours.)

In the case of *Mecham v. McKay,* 37 Cal. 154, at page 158, the court says:

"We have several times decided that we will not review, on appeal, judgments and orders entered by consent. (*Brotherton v. Hart,* 11 Cal. 405; *Corvell v. Cain,* 16 Cal. 502; *Sleeper v. Kelly,* 22 Cal. 456.)"

In the case of *Hanson v. Sherman,* 25 Cal. App. 169 (143 Pac. 73), in ruling upon a demurrer to the complaint the court says at page 172:

"The ambiguity and uncertainty, if any, existing in this allegation could have been corrected by the interposition of a special demurrer. *Such a demurrer was in fact interposed. The demurrer, however, was overruled with the express consent of the defendant.* This was tantamount to a withdrawal of the demurrer, in so far as it was grounded upon the ambiguities and uncertainties of the complaint. (Evans v. Gerken, 105 Cal. 311 (38 Pac. 725).)" (Italics ours.)

SECOND.

1.

The Court Did Not Err in Overruling Defendant's Motion for a Nonsuit Made at the Close of Plaintiff's Case.

(1) Error in Denying a Motion for a Nonsuit Made at the Close of Plaintiff's Case Is Waived and Is Not Assignable as Error in the Appellate Court When Defendant Thereafter Proceeds to Introduce Evidence on Its Own Behalf.

Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, 7 Fed. (2d) 583;

American Film Co. v. Reilly, 278 Fed. 147;

Copper River & N. W. Ry. Co. v. Heney, 211 Fed. 459;

Coeur D'Alene Lumber Co. v. Goodwin, 181 Fed. 949;

Levy v. Larson, 167 Fed. 110;

Northwestern Steamship Co. v. Griggs, 146 Fed. 472;

Fulkerson v. Chisna Min. & Imp. Co., 122 Fed. 782.

In the case of *Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak,* 7 Fed. (2d) 583, at page 585, this court says:

> "The overruling of the motion for a nonsuit, having been *waived* by the defendants, *by adducing testimony after the denial thereof, is not assignable here as error,* nor is it reversible error to refuse to

hear argument where, as here, no prejudice resulted therefrom. 4 C. J. 960, and cases there cited." (Italics ours.)

In the case of *Copper River & N. W. Ry. Co. v. Heney,* 211 Fed. 458, at page 460, this court says:

> "We may pass by the defendant's motion for a nonsuit, made at the close of the plaintiff's evidence, the denial of which is assigned as error, for the defendants thereafter waived their motion by offering testimony in defense of the action."

In the case of *Levy v. Larson,* 167 Fed. 110, at page 111, this court says:

> "The rule is well settled that a motion for a nonsuit, upon which the party making it does not choose to stand, is waived by the subsequent introduction of evidence on his own behalf."

In the case of *Coeur D'Alene Lumber Co. v. Goodwin,* 181 Fed. 949, at page 951, this court says:

> "The motion for a nonsuit was waived by the defendant introducing its evidence after the motion was denied by the court."

In the case of *Northwestern Steamship Co. v. Griggs,* 146 Fed. 472, at page 474, this court says:

> "If the motion be treated as proper in form, it was waived by the defendant's proceeding to introduce evidence on its own behalf, instead of resting upon the motion, and the action of the court in respect to the motion cannot, therefore, be assigned for error here. Union Pacific Ry. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597;

Runkle v. Burnham, 153 U. S. 216, 222, 14 Sup. Ct. 837, 38 L. Ed. 694."

In the case of *Fulkerson v. Chisna Min. & Imp. Co.*, 122 Fed. 782, at page 784, this court says:

> "The exception of the defendants to the order overruling their motion for a nonsuit was followed by evidence on their part in defense of the action, which waived the exception, and precluded their assigning the ruling for error, even if the motion be regarded as appropriate to the nature of the action. Union Pacific Railroad Company v. Daniels, 152 U. S. 684, 687, 14 Sup. Ct. 756, 38 L. Ed. 597; Columbia & Puget Sound Railroad v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Union Pacific Railroad Company v. Callaghan, 161 U. S. 91, 95; 16 Sup. Ct. 493, 40 L. Ed. 628."

Applying the foregoing rules to the case at bar it appears that defendant has waived any right to urge error in the District Court's overruling its motion for a nonsuit since after the motion for a nonsuit was denied defendant proceeded to introduce evidence in its own behalf. [Tr. p. 73, *et seq.*]

(2) A Motion for Nonsuit at Close of Plaintiff's Case Will Not Be Granted Unless Specific Grounds on Which Motion Was Made Are Stated.

Adams v. Shirk, 104 Fed. 54;
Mattson v. Mattson, 181 Cal. 44; 183 Pac. 443;
Brown v. Sterling Furniture Co., 175 Cal. 563; 166 Pac. 322;
Scott v. Sciaroni, 66 Cal. App. 577; 226 Pac. 827;

Henley v. Bursell, 61 Cal. App. 511; 215 Pac. 114;
Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664;
Brown v. Warren, 16 Nevada, 228.

In the case of *Adams v. Shirk,* 104 Fed. 54, at page 58, the court says:

> "The bill of exceptions states simply that, all the evidence being in, 'thereupon the defendant moved the court to *hold the evidence insufficient to sustain the action,* and to direct a verdict for the defendant'; but such a general motion, unaccompanied by a statement or suggestion of reasons for it, may properly be overruled. A practice is not to be approved which will permit of the presentation for review by this court of questions which are not shown to have been called to the attention of the trial court. Columbus Const. Co. v. Crane Co., *supra;* Stewart v. Morris, 37 C. C. A. 562, 96 Fed. 703." (Italics ours.)

In the case of *Henley v. Bursell,* 61 Cal. App. 511 (215 Pac. 114), at page 517, the court says:

> "Another reason why the trial court should have denied the motion is found in the circumstance that *there was no specification of the grounds of the motion.* The record shows that 'the motion for nonsuit was made on behalf of defendants upon the ground that plaintiff had failed to prove a sufficient case.' In *Daley v. Russ,* 86 Cal. 114 (24 Pac. 867), it is said: *'It is undoubtedly the settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered.'"* (Italics ours.)

In the case of *Scott v. Sciaroni,* 66 Cal. App. 577 (226 Pac. 827), at page 581, the court says:

> "Respondent contends that the judgment of nonsuit was properly entered on the ground of insufficiency of the complaint in various particulars. There are two answers to this contention. First, *the grounds now urged were not stated in the motion for a nonsuit* and, second, insufficiency of the complaint is not a statutory ground for granting a nonsuit." (Italics ours.)

In the case of *Brown v. Sterling Furniture Co.,* 175 Cal. 563 (166 Pac. 322), at page 564, the court says:

> "No change, however, has been worked in the uniform and settled law of this state that the party moving for a nonsuit must state in his motion *precisely the grounds upon which he relies.*" (Italics ours.)

In the case of *Coghlan v. Quartararo,* 15 Cal. App. 662 (115 Pac. 664), at page 668, the court says:

> "The request of appellant should probably be treated as a motion for a nonsuit, though not so denominated in the motion, and as such it was properly denied.
>
> Similar motions were made for similar rulings as to the other plaintiffs, *but the grounds of the motions were not stated, except generally that the particular plaintiff had failed to prove his case,* and that 'a corporation as a sub-contractor had no lien under the law.'" (Italics ours.)

In the case of *Mattson v. Mattson,* 181 Cal. 44 (183 Pac. 443), at page 46, the court says:

> "The motion was denied by the court and defendant assigns this as error. (3) It is well established in this state that a motion for nonsuit will not be granted unless the *specific grounds* on which such motion is made are stated. (Coffey v. Greenfield, 62 Cal. 602; Miller v. Luco, 80 Cal. 257 (22 Pac. 195); Drufee v. Seale, 139 Cal. 604 (73 Pac. 435).)" (Italics ours.)

In the case of *Brown v. Warren*, 16 Nevada, 228, at page 239, the court says:

> "If defendants intended to rely upon the ground now urged in their motion for nonsuit, they would have so stated distinctly at the time, and failing to do so, under the circumstances, they waived the point. (*Mateer v. Brown*, 1 Cal. 222; *Baker v. Joseph*, 16 Id. 180; *Kiler v. Kimbal*, 10 Id. 268.)"

Assuming for the purpose of argument that appellant had not waived its right to present the trial court's ruling on its motion for a nonsuit to the Appellate Court for review, nevertheless, the trial court's ruling was correct, for the reason that the grounds now stated as a basis for sustaining the motion were not stated at the time the motion was made in the trial court. The defendant now claims that the motion should have been granted because there was no competent evidence at the close of plaintiff's case to support the allegations of the complaint:

"1. That there was any contract between the parties;

2. That plaintiff had ever produced to defendant 'due evidence' or any evidence whatsoever of title to Tank No. 2;

3. That there had been any breach of contract;

4. That plaintiff had suffered any injury." (Opening Brief p. 13.)

None of these grounds were called to the attention of the District Court at the time the motion for nonsuit was made.

The defendant's motion for a nonsuit being on the following grounds:

(1) That plaintiff had not established facts sufficient to enable it to recover.

(2) That plaintiff had not proved or established the essential allegations of the complaint.

(3) That it did not appear that the contract alleged in the complaint was ever executed or existed between plaintiff and defendant. [Tr. p. 73.]

In the case of *Henley v. Bursell (supra)* the ground of the motion for a nonsuit was: *"that plaintiff had failed to prove a sufficient case."* The appellate court in reviewing the alleged error of the trial court in denying the motion for a nonsuit said at page 517:

> "Another reason why the trial court should have denied the motion is found in the circumstance that there was no specification of the grounds of the motion."

Again, in the case of *Coghlan v. Quartararo (supra)* the ground of the motion for a nonsuit was:

> "That the particular plaintiff had failed to prove his case and 'a corporation as a sub-contractor had no lien under the law'."

The appellate court in affirming the ruling of the lower court in denying the motion for a nonsuit said at page 668:

> "The request of appellant should probably be treated as a motion for a nonsuit though not so

> denominated in the motion and as such it was properly denied. * * * But the grounds of the motion were not stated, except generally that the particular plaintiff had failed to prove his case. * * *"

It is therefore apparent that the first and second grounds stated by defendant in its motion for a nonsuit are almost identical with the grounds stated in *Henley v. Bursell (supra)* and *Coghlan v. Quartarano (supra)*, and therefore as to these grounds the motion in the case at bar was properly denied.

(3) A Motion for a Nonsuit Admits the Truth of Plaintiff's Evidence and Every Inference of Fact That Can Be Legitimately Drawn Therefrom and the Evidence Must Be Interpreted Most Strongly Against the Defendant.

Sandidge v. Atchison T. & S. F. Ry. Co., 193 Fed. 867;

Southern Pac. Co. v. Swanson, 238 Pac. 736.

In the case of *Sandidge v. Atchison T. & S. F. Ry. Co.*, 193 Fed. 867, the District Court granted defendants' motion for a nonsuit. This Circuit Court of Appeals in reversing the decision of the District Court says at page 874:

> "The plaintiff was entitled to have this evidence, with all the inferences properly deducible therefrom, considered in the light most favorable to her cause of action. Kreigh v. Westinghouse & Co., 214 U. S. 249, 256, 29 Sup. Ct. 619, 53 L. Ed. 984; Masner v. Atchison T. & S. F. Ry. Co., 177 Fed. 618, 621, 101 C. C. A. 244."

In the case of *Southern Pac. Co. v. Swanson,* 238 Pac. 736, at page 737, the court says:

> "We are of the opinion that the trial court erred in granting the motion. The court's power and limitations with reference to the granting of a nonsuit are clear and well defined. *The motion admits the truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant.* Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436; Goldstone v. Merchants Cold Storage Co., 123 Cal. 625, 56 Pac. 776; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Bloom v. Allen, 61 Cal. App. 28, 214 Pac. 481." (Italics ours.)

Applying the foregoing rules to the instant case, defendant's motion for a nonsuit on the third ground, *i. e., that it did not appear that the contract alleged in the complaint was ever executed or existed between plaintiff and defendant* was properly denied for the reason that the District Court in deciding this motion must have disregarded all evidence unfavorable to plaintiff and considered all evidence favorable to plaintiff. *There was evidence that S. Reid Holland was the duly authorized agent of the defendant and that he was authorized in writing to execute the contract between plaintiff and defendant.* At the close of plaintiff's case and at the time the motion for a nonsuit was made by defendant there was in evidence the contract between plaintiff and defendant, also the testimony of C. R. Bird, Andrew Mattei, Jr., and H. P. Grimm that the contract had been executed in their presence by S. Reid Holland who had shown them a letter from the defendant authorizing him to act as its agent. [Tr. pp. 60, 61, 62, 69, 70, 71.]

2.

The Court Did Not Err in Denying Defendant's Motion to Strike Out Certain Exhibits and Other Evidence Introduced by Plaintiff, Made at the End of Plaintiff's Case.

(1) A Motion to Strike Out Testimony Must Be Directed With Precision to the Testimony Which the Moving Party Desires the Court to Eliminate.

Chicago Great Western Ry. Co. v. M'Donough, 161 Fed. 657;
Lucy v. Davis, 163 Cal. 611; 126 Pac. 490;
Powley v. Swensen, 146 Cal. 471; 80 Pac. 722;
Traynor v. McGilvray, 54 Cal. App. 31; 200 Pac. 1056;
Miller v. Davis, 187 N. W. 433.

In the case of *Lucy v. Davis,* 163 Cal. 611 (126 Pac. 490), at page 615, the court says:

> "After Mrs. Lucy's deposition was read a motion to strike it out was made. This was based upon the ground that practically all of her testimony appeared on cross-examination to be 'based upon hearsay'. This objection was too indefinite. She testified positively that some payments were made by her to the corporation mentioned in the book then in court, and as the court stated in ruling that it was the book other parts of which had been introduced in evidence, the book and her payments also were thus identified as connected with the Renters Loan and Trust Company. The objection to the admission of the book in evidence, as well as the vague and general motion to strike out her testimony, were prop-

erly overruled. *A motion to be available must be directed with precision to the testimony which the moving party desires the court to eliminate.* (Wadleigh v. Phelps, 149 Cal. 644 (87 Pac. 93).)" (Italics ours.)

In the case of *Traynor v. McGilvray*, 54 Cal. App. 31 (200 Pac. 1056), at page 35, the court says:

"A little later, and before ruling upon this motion, Mr. Hanlon renewed it as follows: 'Mr. Hanlon: I move to strike out the conversation between Mr. McGilvray, our opponent, and this witness in our absence.' The court denied both motions, and its action in so doing is assailed as error.

We cannot give our assent to the appellants' contention in this regard. No ground of objection to this offered evidence was stated in either of said motions, except possibly that the conversation was objected to as in the absence of the plaintiff. This would not be a good objection to that portion of the witness' conversation with McGilvray wherein he asked her to be his intermediary in proferring his aid to the plaintiff; (3) and as to what he said otherwise as to his own previous offer of aid to the plaintiff, *the objection was not confined to this probably objectionable portion of the witness' testimony, but went to the whole statement of the witness*, a portion of which was clearly admissible. It was not, therefore, error of the trial court to deny the plaintiff's motions to strike out the whole of this testimony in the form in which such motions were made. (*Hellman v. McWilliams*, 70 Cal. 449 (11 Pac. 659); *Lucy v. Davis*, 163 Cal. 611 (126 Pac. 490); *Estate of Huston*, 163 Cal. 166 (124 Pac. 852).)"

In 38 Cyclopedia of Law and Procedure at page 1404 it is said:

> *"A motion to strike out must be so specific that there can be no mistake as to what evidence is sought to be stricken out.* It should set out the exact testimony sought to be stricken out. It must be confined to the improper testimony and must separate the proper evidence from the improper with such certainty as to leave no doubt as to the evidence challenged." (Italics ours.)

In the case of *Chicago Great Western Ry. Co. v. M'Donough,* 161 Fed. 657, at page 671, the court says:

> "But in our opinion the defendant is not in a position to complain that this evidence was admitted or that it was not stricken out. The objection interposed when the after condition of the flues was about to be shown was not tenable, because it was nothing less than an assertion that no evidence of that character was admissible for the purpose indicated, which was not the case, as the authorities amply show. Droney v. Doherty, 186 Mass. 205, 71 N. E. 547; Creamery Package Mfg. Co. v. Hotsenpiller, 159 Ind. 99, 64 N. E. 600; 1 Wigmore Ev. Sec. 437. And the *motion to strike out was in terms directed against 'all evidence'* of that character, and so covered that relating to the pitted, blistered and burned conditon of some of the flues, as well as that which it is now said was objectionable. To have sustained the motion in the terms in which it was made would undoubtedly have been error, and yet the court was not bound to do more than to respond to it as made. As has been well said: 'Courts of justice are not obligated to modify the propositions submitted by counsel, so as to make them fit the

case. If they do not fit, that is enough to authorize their rejection.' Elliott v. Piersol, 1 Pet. (U. S.) 328, 338, 7 L. Ed. 164." (Italics ours.)

In the case of *Powley v. Swensen,* 146 Cal. 471 (80 Pac. 722), at page 477 the court says:

"2. At the close of plaintiffs' evidence defendants moved to strike out *all the testimony* of City Engineer Dockweiler, on the ground that it had not been shown that the retaining wall was built in accordance with the plans and specifications prepared in his office. The court denied the motion. * * *

* * * But the ruling was correct on other grounds. Witness Dockweiler had testified to the condition and stratification of the earth above the tunnel; to the pitch of the shale toward the wall; to the loosening effect of water permeating this body of earth and shale; to the additional pressure and force of a moving body of earth. and other facts. *The motion was too general, for some of the testimony was clearly admissible regardless of the point made by defendants. The motion should have been directed with precision to the objectionable testimony if there was such.* (Hellman v. McWilliams, 70 Cal. 449.)" (Italics ours.)

In the case of *Miller v. Davis,* 187 N. W. 433, at page 434 the court says:

"According to the abstract, the evidence went in without objection, and after the witnesses had testified as to the value of hauling and cutting, and had given testimony on other subjects, *defendant moved to exclude all the testimony of this witness relating to the fair value for the hauling and cutting of the timber in the fall of 1917, as incompetent, ir-*

*relevant, and immaterial, and the witness incompetent. * * * Furthermore, the objection made in the motion to exclude is not sufficiently specific. It must be specific when the objection is overruled.* State v. Wilson, 157 Iowa 698, 713, 141 N. W. 337; Harvey v. Railway, 129 Iowa 465, 482, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483; State v. Madden, *supra.*" (Italics ours.)

In the case of *Perazzo v. Ortega,* 241 Pac. 518, at page 519 the court says:

"The witness had testified to a number of things, part of which she saw herself, and part of which she heard from other persons, and counsel for the defense, after the testimony had been completed, made the following motion:

'I move to strike out all the evidence of this witness with reference to this dog attacking this colored woman as hearsay.'

Part of the evidence was admissible and part was objectionable, but it was not the duty of the court to separate it, and, counsel having made his motion in these general terms, it was properly overruled." (Italics ours.)

In the case of *Wadleigh v. Phelps,* 149 Cal. 627 (87 Pac. 93), at page 644, the court says:

"The *motion to strike out,* made subsequent to the amendments to the answer eliminating the issues as to such other deeds, *was too broad,* being a motion to strike out *all letters,* including those written subsequent to November 13, 1894, and was properly denied, regardless of the question as to whether the earlier letters were proper evidence upon the issue as to the mining property." (Italics ours.)

In the case of *Mount Vernon Brewing Co. v. Oscar Teschner,* 69 Atl. 702, the following motion to strike out testimony was denied:

> "To strike out all the testimony on the direct examination which was in regard to any correspondence or conversation had between the appellee and J. E. Newman & Co.; that it be stricken out on the ground that the correspondence had not been produced and we had not had the opportunity to examine the witness on it,"

the court saying in passing upon the motion, at page 704:

> "Then this motion was too broad, as it not only included the copy of the letter spoken of, which had been admitted without objection, but it also included conversations."

(2) It Is Not Error to Deny a Motion to Strike Out Testimony in the Absence of a Statement by Counsel of the Grounds Upon Which the Motion Is Made.

Central Vermont R. Co. v. Ruggles, 75 Fed. 953;
Gaffney v. Mentele, 119 N. W. 1030;
City of Chicago v. Seben, 46 N. E. 244;
In re Evans' Estate, 86 N. W. 283.

In the case of *Central Vermont R. Co. v. Ruggles,* 75 Fed. 953, at page 958, the court says:

> "Thereupon the counsel for the defendant below moved that these three answers be stricken out, but he failed to state his reason therefor, and failed, therefore, to lav the foundation for exceptions according to the general rules touching such matters."

In the case of *Gaffney v. Mentele,* 119 N. W. 1030, at page 1031, the court says:

> "Furthermore, the motion to strike out testimony of witness T. H. Gaffney was not certain and definite. It was in the following words, 'Defendant moves to strike out this witness' testimony with reference to the payment of money,' without giving any reason why it should be stricken."

In the case of *City of Chicago v. Seben,* 46 N. E. 244, at page 245, the court says:

> "Where the defendant moves to strike out plaintiff's evidence on the ground of variance, it is incumbent on him to point out in what the variance consists, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to amend his declaration, so as to make it conform to the proof, and to avoid defeat upon a point not involving the merits of the claim. Railway Co. v. Ward, 135 Ill. 511, 26 N. E. 520; Libby v. Scherman, 146 Ill. 540, 34 N. E. 801."

In the case of *In re Evans' Estate,* 86 N. W. 283, at page 283, the court says:

> "Proponents moved to strike out a certain statement made by the deceased to his wife before the divorce, but gave no reasons therefor; and they also moved to strike out all communications made by husband to wife, without pointing out the communications objected to. The motion was made after the wife had given a great deal of evidence, some of which was competent, as relating to the appearance, demeanor, and conduct of the husband, and some of which was incompetent for the reasons suggested. *Such an omnibus motion will not be regarded, especially when, as in this case, no grounds for the motion are stated."* (Italics ours.)

In the case at bar defendant's motion to strike out was in the following language:

"Defendant here moved the court to strike out the various matters and things read by plaintiff's counsel from depositions and exhibits tendered or offered in evidence herein, upon the ground that the same had not been connected up, or a foundation laid therefor, as counsel represented it would be laid." [Tr. p. 73.]

Apply the foregoing rules to defendant's motion to strike it appears that it was properly denied for the reasons, First: That defendant's motion did not specify the objectionable portions of the evidence that defendant wished stricken from the record and, Second: That the grounds of the motion were not stated with such precision as to enable the District Court to pass upon the alleged defects or permit plaintiff to introduce evidence to correct them.

THIRD.

1.

The Court Did Not Err in Admitting in Evidence the Following Exhibits: 6, 102, 103, 79, "A", 10, 11, 38, 16, 37, 39, 138, 139, 142, and 144.

(1) Where Portions of a Document Offered in Evidence Are Admissible a General Objection to the Entire Document Does Not Authorize Its Exclusion.

Osley v. Adams, 268 Fed. 114;
Southern Pac. Co. v. Stevens, 258 Fed. 165;
Estate of De Laveaga, 165 Cal. 607; 133 Pac. 307;
10 Cal. Jur., 822.

In the case of *Southern Pac. Co. v. Stevens*, 258 Fed. 165, at page 166, the court says:

> "It is contended that it was error to admit in evidence certain exhibits, to which objection was made, on the ground that they were self-serving, incompetent, immaterial, and irrelevant. * * * It was proper for the plaintiffs to show that they were making every effort to obtain cars from the defendant and were advising them of the importance of having the cars on hand. *If there were any self-serving statements in the dispatch, objections should have been directed specifically to these portions thereof, not to the whole body of the dispatch.*" (Italics ours.)

In the case of *Osley v. Adams*, 268 Fed. 114, the court says at page 116:

> "The objection to the reception in evidence of the record in the bankruptcy proceedings is clearly without merit. No exception was taken to the report of the master on this ground. The report was admissible for a number of purposes. Much of it consisted of original evidences of debt, showing their dates. *If any part of the record was inadmissible, it should have been particularly objected to.*" (Italics ours.)

In the case of *Estate of De Laveaga*, 165 Cal. 607 (133 Pac. 307), at page 635 the court says:

> "Contestant's Exhibits 205 and 206, being two letters from Ignacia to Miguel; as in the case of contestant's Exhibit 39, under heading 'D,' *both of these letters were in part admissible as a portion of the line of evidence showing the actual transaction* of the business of deceased by her relatives, even

that business relating to the receipt and expenditure of moneys for her own personal needs. As to the letter of January 21, 1887, a portion of which was 'for you know her and to go to sign it at the bank or before a clerk the poor thing suffers,' *this being the only portion as to which objection may reasonably be made, the objection of incompetency was to the whole letter, and was therefore properly overruled.*" (Italics ours.)

In 10 Cal. Jur., 822, the author says:

"So where it is objected generally that evidence is 'irrelevant, incompetent and immaterial,' without specification being made of the point in which the evidence is insufficient, the objection should be overruled if it is admissible for any purpose. *Thus, where part of a letter offered in evidence is admissible, the remainder being incompetent, an objection of incompetency directed to the whole letter is properly overruled.*" (Italics ours.)

In connection with these exhibits it is to be noted that there was an issue before the district court as to whether or not defendant had engaged in business in California. Paragraph I of the complaint alleges in part as follows: "that defendant is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the state of Illinois and *doing business within the state of California;*" (Italics ours.) [Tr. p. 5.]

The foregoing portion of paragraph I is denied by paragraph I of the answer, which reads as follows:

"Defendant *denies* that during any or all of the times mentioned in the complaint, *it was, or is now, doing business within the state of California.*" (Italics ours.) [Tr. p. 13.]

a.

EXHIBITS 6 AND 10 WERE PROPERLY ADMITTED.

Exhibit 6 was a letter from the defendant to S. Reid Holland and contains this statement:

"*All of our agents* are handled in a like manner, and in view of the fact that we have been universally successful in our arrangements with them I can see no reason whatsoever why the same sort of an agreement should not be acceptable and work satisfactorily in *your case.*

Yours very truly,
Manager Tank Sales."

(Italics ours.) [Tr. p. 34.]

Exhibit 10, a letter from the vice-president of the Graver Corporation to S. Reid Holland, contains these statements:

"We are not very well pleased with the way *you have handled this item.*" (Italics ours.) [Tr. p. 49.]

"Whatever percentage of the total contract the customer pays on account, this will be your percentage against your total commission. Also all customers' accounts are to be paid direct to us by the customer. This is our regular rule that is followed by *all of our men.*" (Italics ours.) [Tr. p. 51.]

These statements were undoubtedly admissible and relevant as evidence of the fact that S. Reid Holland was the agent of the defendant in the state of California.

b.

EXHIBITS 102 AND 103 WERE PROPERLY ADMITTED.

Both Exhibits 102 and 103 referred to the contract between defendant and Geo. F. Getty, the subject matter

of which was "Graver Tank No. 2," and were sent to Geo. F. Getty and Thompson Holland Company during the negotiations between Getty and defendant for the settlement of their differences.

Exhibit 102 reads in part as follows:

"We are not inclined to take advantage of this situation and would recommend leniency on your part also.

Graver Corporation."

[Tr. p. 41.]

This portion of Exhibit 102 is a clear recognition by defendant of the fact that the settlement with Geo. F. Getty regarding "Graver Tank No. 2" was entirely in Holland's hands.

Exhibit 103 reads as follows:

"To Geo. F. Getty,
536 Union Oil Bldg.,
Los Angeles, California.

Wired Thompson Holland Night letter advising extent of damage *if your order is cancelled please handle settlement thru them.*

Graver Corporation."

(Italics ours.) [Tr. p. 41.]

It is clear that this telegram to Getty directly authorizes Holland to make a settlement regarding "Graver Tank No. 2."

c.

Exhibits 79 and 11 Were Properly Admitted.

Exhibit 79 showed as defendant states in its opening brief at page 19:

"That at some time plaintiff in error (defendant) had received through Holland a certain order from a third party."

This third party was Geo. F. Getty whom the evidence shows was a resident and did business in Los Angeles, California. It is therefore competent evidence as tending to prove the allegation of paragraph I of the complaint denied by defendant's answer that defendant was doing business in California.

Exhibit 11 reads in part as follows:

"stop was elected director yesterday mercury refinery which enables me to better protect *our* White Star interests.

S. Reid Holland."

(Italics ours.) [Tr. p. 54.]

This exhibit is evidence of the fact that Holland was representing the Graver Corporation as he refers in his telegram to protecting *"our White Star interests."* It is further evidence of the fact, denied by defendant, that defendant was doing business in the state of California.

d.

EXHIBIT "A" WAS PROPERLY ADMITTED.

This exhibit which was duly identified [Tr. p. 44], shows according to the testimony of W. F. Graver, vice-president and treasurer of the defendant, that the check received from Geo. F. Getty in consideration of the execution of the contract between Geo. F. Getty and Graver Corporation, Exhibit 2 [Tr. p. 63], was accepted by the defendant and placed to the credit of Geo. F. Getty on account of the balance due on "Graver Tank No. 2." [Tr. p. 46.]

The evidence tended to show that the defendant accepted the benefits of its agent's act and knew of his

negotiations with Geo. F. Getty, which, as Exhibit 2 shows, provided for the contract between the plaintiff and defendant. Exhibit 2, which was the contract between defendant and Geo. F. Getty, reads in part as follows:

"that I will on the part of the Graver Corporation, agree to the execution of *a contract between the Graver Corporation and the Hercules Gasoline Company to supplement an equivalent in tonnage viz., $27,000.00 in fabricated steel to be shipped on or before August first, 1924*, and at the prevailing price of such steel and that such agreement shall provide for the erection of the said steel at prevailing price for such erection, but in no case to be less than $9,000.00, it being the sense of this agreement that this exchange is to supplement the full contract price for the erection of tank number two, at Santa Fe Springs, Calif., viz., $36,000.00." (Italics ours.) [Tr. p. 64.]

e.

EXHIBIT 38 WAS PROPERLY ADMITTED.

This exhibit contains the following statement.

"*Hercules agreed and did purchase tank #2 and at this writing it is their property.* * * * Please bear in mind that in endeavoring to work out this solution I had in mind the final settlement for you on the Getty account and I feel that the transaction with the Hercules Company will be a good one for us as they are going to need considerably more equipment and storage." Italics ours.) [Tr. pp. 56, 57.]

This statement is evidence of the fact that the plaintiff acquired and furnished to the defendant due evidence of having acquired title to "Graver Tank No. 2;" further

that defendant and defendant's agent had knowledge of this fact.

It is to be noted that in this letter Holland transmitted to the defendant the contract which is the basis of this suit, to-wit, Exhibit 1, and also the contract between defendant and Geo. F. Getty, Exhibit 2. It is apparently in answer to this letter from Holland that defendant wrote to Holland April 2, 1924, in part as follows:

"So far, we have done nothing on the Hercules contract, and can do nothing until this tank matter is settled. We do not know much about the Hercules Company credit, but W. F. is to look this up while he is in California. It looks as if you will have to play a fine Italian hand with the Hercules Company to keep from getting us in bad, and I want you to keep us posted regarding the situation.

Yours very truly,
Graver Corporation
PSG:AJ Vice-President."
[Tr. pp. 52, 53.]

f.

EXHIBITS 16, 37, 39, 138, 139, 142 AND 144 ARE EVIDENCE OF THE FACT THAT THE GRAVER CORPORATION WAS AND HAD BEEN DOING BUSINESS IN THE STATE OF CALIFORNIA AND HAD RECOGNIZED S. REID HOLLAND AS ITS AGENT AT LOS ANGELES.

Phil S. Graver, vice-president and chairman of the board of directors of the defendant testified in identifying these exhibits as follows:

" 'Holland had specifications and inter-office correspondence and contract forms. Exhibits A-1, A-B-2 and

2-A annexed to the deposition are on forms supplied by our sales department. Holland never discussed with me the question of placing the name of Graver Corporation on his stationery; it is a general custom, however, among our engineering agents to put our name on their letterheads to cover items that they sell.'" [Tr. p. 58.]

These exhibits are evidence of the fact that S. Reid Holland was the agent of defendant in California.

2.

The Court Did Not Err in Admitting in Evidence Statements of S. Reid Holland Regarding His Authority to Represent the Defendant.

(1) Where an Agency Is Otherwise Prima Facie Proved, the Declarations of the Agent Are Admissible as Corroboration.

In the case of *Hope Mining Co. v. Burger,* 37 Cal. App. 239 (174 Pac. 932), at page 244 the court says:

> "*Where the agency is otherwise prima facie proved the declarations of the alleged agent are admissible in corroboration* where they constitute a part of the *res gestae* and were made at the time of the transaction in question. They are admissible to show that the agent acted as such and not on his individual account, and *also to show the nature and extent of his authority.* (Robinson v. American Fish, etc. Co., 17 Cal. App. 212 (119 Pac. 388); 2 C. J., p. 930.)" (Italics ours.)

(2) An Objection to a Question on the Grounds That It Is Immaterial, Irrelevant and Incompetent Is Insufficient if the Particular Fault Relied Upon Is Not Otherwise Pointed Out.

New York Electric Equipment Co. v. Blair, 79 Fed. 896;

McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355;

Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307;

19 Cal. Jur., 822;

1 Wigmore on Evidence, 2nd Edition, 181.

In the case of *New York Electric Equipment Co. v. Blair,* 79 Fed. 896, at page 898, the court says:

> "One question was objected to as immaterial, *irrelevant, and incompetent.* The point is now made that the testimony was incompetent, because competent testimony must be predicated upon facts explicitly stated and communicated to the jury. This objection is valueless for at least two reasons. The first is that the objection, when taken, *did not state the particular fault* which is now relied upon, and which, if stated at the trial and if true, could easily have been obviated. The alleged error is a specimen of a practice not to be encouraged, which is to object with a rattle of words that conceal the real nature of an objection capable of being removed on the spot, and to announce its true character for the first time in the Appellate Court. In Noonan v. Mining Co., 121 U. S. 393, 7 Sup. Ct. 911, the introduction of articles of incorporation was objected to because they were 'immaterial, irrelevant, and incompetent' evidence. Upon the specific objection, which was urged upon the writ of error, that they were not

sufficiently authenticated to be admissible, Mr. Justice Field said:

> *'The objection "incompetent, immaterial, and irrelevant" is not specific enough.* The rule is universal that, when an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not be obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances this can be done.'" (Italics ours.)

In the case of *McCann v. Children's Home Society,* 176 Cal. 359 (168 Pac. 355), at page 368, the court says:

> "A physician, having qualified as an expert, after stating that he had heard or read all of the evidence introduced on behalf of the plaintiff, was allowed, over objection, to give his opinion that the grantor was of sound mind. It may be conceded that this is not a proper method of eliciting the opinion of an expert. *(People v. Le Doux,* 155 Cal. 535, 555, (102 Pac. 517).) *But the particular objection which counsel now urges was not stated in the court below, the objection being on general grounds."* (Italics ours.)

In *10 Cal. Jur.,* 822, the author says:

> "So, where it is objected generally that evidence is 'irrelevant, incompetent and immaterial,' without specification being made of the point in which the evidence is insufficient, the objection should be over-

ruled if it is admissible for any purpose. Thus, where part of a letter offered in evidence is admissible, the remainder being incompetent, an objection of incompetency directed to the whole letter is properly overruled. If, however, the offered evidence is inadmissible for any purpose, a general objection is sufficient."

In the case of *Estate of De Laveaga*, 165 Cal. 607 (133 Pac. 307), at page 635, the court says:

"Contestant's Exhibits 205 and 206, being two letters from Ignacia to Miguel: As in the case of contestant's Exhibit 39, under heading 'D', both of these letters were in part admissible as a portion of the line of evidence showing the actual transaction of the business of deceased by her relatives, even that business relating to the receipt and expenditure of moneys for her own personal needs. As to the letter of January 21, 1887, a portion of which was 'for you know her and to go to sign it at the bank or before a clerk the poor thing suffers,' this being the only portion as to which objection may reasonably be made, *the objection of incompetency was to the whole letter, and was therefore properly overruled.*" (Italics ours.)

In *1 Wigmore on Evidence,* 2nd Edition, page 181, it is said:

"(1) *General Objection.* The cardinal principle (no sooner repeated by courts than it is ignored by counsel) is that a *general objection, if overruled,* cannot avail:"

In the case at bar there was an abundance of evidence introduced prior to the testimony objected to, that, uncontradicted, proved *prima facie* that S. Reid Holland

was the agent of the defendant. For example, Exhibit 103 [Tr. p. 41], directing Geo. F. Getty to handle the transaction in regard to "Graver Tank No. 2" through S. Reid Holland. Again, Exhibit 11 [Tr. p. 53], where there is evidence that S. Reid Holland was elected a director of the Mercury Refining Company to represent the defendant. Therefore, even though the objection had been raised that statements of an agent as to his authority were not admissible, the evidence objected to in this case was admissible within the rule stated in the case of Hope Mining Company v. Berger *(supra)*.

However, the defendant may not now urge for the first time, that the evidence was not admissible, for the reason that the only objection made to the admission of this testimony was in the following words:

"This was objected to on the ground it is incompetent, irrelevant and immaterial." [Tr. p. 61.]

There is no mention made in the objection that it is not competent for an agent to testify regarding the scope of his authority. Therefore, as stated in the case of New York Electric Equipment Company v. Blair, *supra:*

> "The objection 'incompetent, immaterial, and irrelevant' is not specific enough. The rule is universal that, when an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, * * *."

(3) An Objection That Evidence Is Incompetent, Irrelevant and Immaterial Does Not Raise the Question That the Evidence Was Objectionable Because a Conclusion of the Witness.

In the case of *Tanner, et al. v. Harper,* 75 Pac. 404, at page 405, it is said:

> "In these circumstances it cannot be successfully urged that the answer was not responsive to the question. The principal objection now called to our attention is that the answer did not state facts, but the *opinion of the witness*, which was *improper. That objection was not called to the attention of the trial court by the motion made, and cannot be raised for the first time on review."* (Italics ours.)

In the case of *Roth Shoe Mfg. Co. v. Kartus,* 99 Southern 772, at page 774, the court says:

> "Over the objection and exception of plaintiff defendant's counsel was permitted to ask the defendant, as a witness:
>
> 'At the time this contract was made, I will ask you if this Mr. Mattox (plaintiff's salesman who made the contract with defendant) made any representation to you as to what the contract contained and if so what?'
>
> The objections on the trial were general and now for the first time the insistence is made that the question called for a conclusion. The question does not call for evidence that is either illegal, immaterial, or irrelevant; the answer is germane to the only issue involved in the plea. Neither does it call for a conclusion, *but, if this were a fact, that question could not now be considered, not having been assigned on the trial.* Jefferson v. Rep. I. & S. Co.,

208 Ala. 143, 93 South. 890. The foregoing also applies to assignment 6.

The objection to question and motion to exclude answer, made the basis of assignments 7 and 8, were general and not here and now reviewable on specific grounds not stated on the trial. Authorities, *supra.*" (Italics ours.)

In the case of *Jefferson v. Republic Iron & Steel Co.*, 93 Southern, 890, at page 893, the court says:

"The objection to the question to witness Hooper, 'Is that grade of that dynamite there a good trade?' referring to the kind and grade of dynamite defendant furnished to its employes at the time of plaintiff's injury, was that it 'called for illegal, irrelevant, and immaterial testimony.' Under the issues of the case, this was merely a general objection, and presented nothing for review."

3.

The Trial Court Did Not Err in Refusing to Strike Out Evidence Regarding the Contents of the Lost Letter Written by the Defendant to S. Reid Holland Authorizing Holland to Represent Defendant on the Pacific Coast.

A. There Was Proof of the Loss of the Letter.

S. Reid Holland who was served with a subpoena *duces tecum* stated that he did not have the letter referred to in his possession and that he had looked every place where he ordinarily kept letters and could not locate it. [Tr. p. 66.]

B. There Was Proof of the Due Execution of the Letter.

C. R. Bird testified on direct examination as follows:

"In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on a Graver letterhead *signed Graver Corporation by W. F. Graver.*" (Italics ours.) [Tr. p. 61.]

Again, H. P. Grimm testified on direct examination as follows:

"Holland said several times that he did, and said he had a letter and he showed us a letter *from Graver Corporation* on their stationery *signed by one of the Gravers,* tending to show Holland had authority to act for Graver Corporation." (Italics ours.) [Tr. p. 69.]

"I remember the letter distinctly because Holland said, 'Here is a letter from Graver Corporation with their heading on,' tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; *it was signed by one of the Gravers* whose initials begin with a 'W'." (Italics ours.) [Tr. p. 70.]

Andrew Mattei, Jr., testified as follows:

"The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles; it was *signed Graver Corporation by W. F. Graver.*" (Italics ours.) [Tr. p. 71.]

C. There Was a Recital of the Contents of the Letter by Witnesses Who Recollected It.

(1) Objections to Evidence Because Questions Called for Conclusions of Witnesses Cannot Be Reviewed Where Not Made in the Trial Court.

In the case of *Knight v. Bentel,* 39 Cal. App. 502 (179 Pac. 406), at page 508, the court says:

> "The point that rulings of the court, to which exceptions 2, 3 and 4 were reserved, were error, because the questions *called for mere conclusions of the witness,* and not for a statement of fact, is not well taken, because *this objection was not advanced in the trial court and appears in this court for the first time. (Watrous v. Cunningham,* 71 Cal. 30, (11 Pac. 811); *People v. McCauley,* 45 Cal. 146; *People v. Bishop,* 134 Cal. 682, (66 Pac. 976).)" (Italics ours.)

(2) Testimony Consisting of Mere Conclusions of the Witnesses Must Be Given Effect Where It Is Admitted Without Objection.

Diaz v. United States, 223 U. S. 442;
Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 Southwestern, 1114;
McDonald v. Humphries, 146 Southwestern, 712;
1 Wigmore on Evidence, 173;
9 Encyclopedia of Evidence, 116;
38 Cyclopedia of Law and Procedure, 1395.

In the *Texas* case of *Wichita Falls & W. Ry. Co. of Texas v. Asher,* 171 Southwestern, 1114 at 1117, it is said:

> "We presume, if this testimony had been objected to as a *conclusion of the witness,* such objection would have been sustained, and as the Supreme Court of the United States said in the Albert Commission Co. case, *supra,* in passing upon a similar question:
>
> 'This testimony was not the best evidence, but, being offered and admitted without objection, *it was evidence which could not be disregarded.*'" (Italics ours.)

In the Texas case of *MacDonald v. Humphries,* 146 Southwestern, 712 at 713, the court says:

> "The evidence tending to show that appellee had parted with the title consists only of Brown's testimony, *which is, in effect, a legal conclusion;* but, as it seems to have been admitted without objection on that ground, it is sufficient to raise the issue." (Italics ours.)

In *9 Encyclopedia of Evidence,* 116, it is said:

> "Inadmissible conclusions or opinions of witnesses, if not properly and seasonably objected to, become evidence in the case and should be given the weight to which they are entitled."

In *38 Cyclopedia of Law and Procedure,* 1395, it is said:

> "* * * So, a failure to object waives objections that the witness was not sworn; *that the answer states a legal conclusion;* * * *" (Italics ours.)

In the case of *Diaz v. United States,* 223 U. S. 442, at 450, the court says:

"True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. *So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible.*" (Italics ours.)

The evidence in the case at bar shows that there were at least three witnesses who testified to the contents of the lost letter. C. R. Bird testified in regard to the contents of the letter as follows:

"The gist of the part that I saw was that *Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation,* particularly the settlement of the tank deal with Getty." (Italics ours.) [Tr. p. 61.]

H. P. Grimm testified as follows:

"Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery signed by one of the Gravers, *tending to show Holland had authority to act for Graver Corporation.*

* * *

I remember the letter distinctly because Holland said, 'Here is a letter from Graver Corporation with their heading on,' tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; it was signed by one of the Gravers

whose initials begin with a 'W'." (Italics ours.) [Tr. pp. 69-70.]

Andrew Mattei, Jr., testified as follows:

"The contents of that portion was *that Holland had full authority to act for Graver* in and around Los Angeles; it was signed Graver Corporation by W. F. Graver." (Italics ours.) [Tr. p. 71.]

This testimony even though it be conceded for the purpose of argument to be conclusions of the witnesses, was admissible and evidence in the case, and not being objected to on the ground that it was a conclusion of the witness, defendant will not be heard to raise this objection for the first time on appeal.

It, therefore, clearly appears that there was abundant evidence of the contents of the letter, and that since defendant's objection was merely a general one, being in the following words:

"This was objected to on the ground it is incompetent. irrelevant and immaterial." [Tr. p. 61.]

it has waived any right to urge in the Appellate Court that the statements were purely conclusions of the witnesses.

(3) Preliminary Proof as to the Loss of a Document Lies Solely Within the Sound Discretion of the Trial Judge, Exercise of Which Discretion Will Not Be Disturbed Unless the Preliminary Showing Is Manifestly Insufficient.

Choctaw Lumber Co. v. Waldock, 190 Pac. 866;
Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869;
California National Bank v. Weldon, 14 Cal. App. 765, 113 Pac. 334;
22C. J., 1052.

In the case of *Morison v. Weik,* 19 Cal App. 139 (124 Pac. 869), at page 141, the court says:

> "Without entering upon a full discussion of the evidence, suffice it to say that it was sufficient to satisfy the mind of the court that the instrument was unintentionally mislaid or lost, and that after a diligent search made therefor it could not be found. *Such preliminary proof is left to the discretion of the trial judge,* and unless manifestly insufficient to warrant the introduction of secondary evidence, his ruling will not be disturbed on appeal. (Kenniff v. Caulfield, 140 Cal. 35 (73 Pac. 803).)" (Italics ours.)

In the case of *Choctaw Lumber Co. v. Waldock,* 190 Pac. 866, at page 868, the court says:

> "(5) The determination of the trial court, based upon supporting evidence, that a written agreement is lost, and that secondary proof of the terms of the lost writing is admissible, will not be disturbed on appeal. Marker v. Gillam, 54 Okl. 766, 154 Pac. 351; 17 Cyc. 542, and cases cited therein; Wigmore on Evidence, Vol. 2, p. 1405."

In the case of *California National Bank v. Weldon,* 14 Cal. App. 765 (113 Pac. 334), at page 773, the court says:

> "1. Where secondary evidence of the contents or nature of a lost instrument is sought to be introduced, the rule is as stated in Kenniff v. Caulfield, 140 Cal. 34 (73 Pac. 803), and as claimed by defendant. In the case cited the question was whether the conveyance was a grant, bargain and sale deed or a deed of gift. The proof of loss consisted of a search being made in a bureau drawer

where the deed had been for seven months before it was missed, and nowhere else, and it was held sufficient to raise a presumption of its loss. The court, in discussing the rule said: 'The rigor of the common law * * * has been relaxed in this respect, and non-production of instruments is now excused for reasons more general and less specific, and upon grounds more broad and liberal than were formerly admitted. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in fact, courts in such cases are extremely liberal. And the rule in questions of this character is, that the trial judge is to determine the sufficiency of the proof. *Under the facts and circumstances developed in the case, if they are sufficient to reasonably satisfy the mind of the court that the original is lost, and that it cannot be found after search made at the proper place, that is all that is necessary, and the sufficiency of the proof of the search being in general left to the discretion of the trial judge, this court will not review its rulings in that respect,* unless the proof is manifestly insufficient to have warranted secondary evidence." (Italics ours.)

In *22 C. J.*, page 1052, the rule is stated to be as follows:

"Preliminary proof of the loss or destruction of primary evidence does not involve the question in issue and is not regarded as evidence in the cause; it is addressed solely to the trial court and its sufficiency is a question for that court and not for the jury. *Moreover, the sufficiency of the evidence on*

> *the preliminary proof rests in the sound discretion of the trial court, whose determination will generally not be disturbed by an appellate court,* although it is reviewable and may be overruled where an abuse of discretion amounting to error of law appears." (Italics ours.)

Clearly in the case at bar there was evidence to support the District Court's finding and it cannot be truthfully said that the proof was manifestly insufficient to warrant secondary evidence.

4.

The Court Did Not Err in Permitting H. P. Grimm to Testify as to Statements Made by S. Reid Holland as to His Authority to Represent Defendant.

The case of *Hope Mining Company v. Burger,* cited above, where the court at page 244, says:

> "Where the agency is otherwise *prima facie* proved the declarations of the alleged agent are admissible in corroboration where they constitute a part of the *res gestae* and were made at the time of the transaction in question. They are admissible to show that the agent acted as such and not on his individual account, *and also to show the nature and extent of his authority.* (Robinson v. American Fish, etc. Co., 17 Cal. App. 212, (119 Pac. 388); 2 C. J., p. 930.)" (Italics ours.)

is in point as far as this objection is concerned. As heretofore pointed out the agency of S. Reid Holland for the defendant was *prima facie* proved by other evidence at the time the testimony here objected to was admitted.

Further, the objection is merely a general objection that the evidence was incompetent, irrelevant and immaterial and therefore the admission of the testimony may not be assigned as error on this appeal on the ground that an agent may not testify as to the scope of his authority.

5.

The Trial Court Did Not Err in Denying Defendant's Motion Made at the Close of Plaintiff's Case to Strike Out Testimony Which Had Been Received Conditionally on the Ground That No Testimony Had Been Offered Establishing a Connection or Laying a Proper Foundation for Its Admission.

(1) A Motion to Strike Out the Whole of Testimony Part of Which Is Admissible Is Properly Denied.

In the case of *Traynor v. McGilvray*, 54 Cal. App. 31 (200 Pac. 1056),at page 35, the court says:

> "A little later, and before ruling upon this motion, Mr. Hanlon renewed it as follows: 'Mr. Hanlon, I move to strike out the conversation between Mr. McGilvray, our opponent, and this witness in our absence.' The court denied both motions, and its action in so doing is assailed as error.
>
> We cannot give our assent to the appellants' contention in this regard. No ground of objection to this offered evidence was stated in either of said motions, except possibly that the conversation was objected to as in the absence of the plaintiff. This would not be a good objection to that portion of the witness' conversation with McGilvray wherein he asked her to be his intermediary in proffering his

aid to the plaintiff; (3) and as to what he said otherwise as to his own previous offer of aid to the plaintiff, the objection was not confined to this probably objectionable portion of the witness' testimony. but went to the whole statement of the witness, a portion of which was clearly admissible. *It was not, therefore, error of the trial court to deny the plaintiff's motion to strike out the whole of this testimony in the form in which such motions were made.* (*Hellman v. McWilliams*, 70 Cal. 449 (11 Pac. 659); *Lucy v. Davis*, 163 Cal. 611 (126 Pac. 490); *Estate of Huston*, 163 Cal. 166 (124 Pac. 852).)" (Italics ours.)

(2) A Motion to Strike Out Evidence Is Properly Denied Unless the Motion Specifies the Ground of Objection.

In the case of *Lippitt v. St. Louis Dressed Beef & Provision Co.*, 57 N. Y. Supp. 747, at page 748, the court says:

"2. The defendant's contention as to the erroneous admission of the conversation over the telephone is without merit. Its counsel moved to strike out Glover's testimony of a conversation had with De Casse or other employes of the defendant. *He assigned no grounds for the motion, and, as such conversations are not in their nature incompetent* (Murphy v. Jack, 142 N. Y. 215, 36 N. E. 882) *the failure to specify the objection, and thereby afford the plaintiff an opportunity to obviate it, renders the exception unavailable.* Bergmann v. Jones, 94 N. Y. 51. The judgment must therefore be affirmed." (Italics ours.)

(3) Testimony Consisting of Mere Conclusions of the Witness Must Be Given Effect Where It Is Admitted Without Objection on This Ground.

Diaz v. United States, 223 U. S. 442 (cited *supra);*
Tanner, et al., v. Harper, 75 Pac. 404 (cited *supra);*
Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114 (cited *supra);*
McDonald v. Humphries, 146 S. W. 712 (cited *supra);*
1 Wigmore on Evidence, 173 (cited *supra);*
9 Encyclopedia of Evidence, 116 (cited *supra).*

Applying the foregoing rules to the present objection to the ruling of the District Court it clearly appears that there was a *prima facie* showing by other evidence that S. Reid Holland was the agent of the defendant, and even though this were not true, defendant may not urge this point in the appellate court for two reasons:

First, the motion to strike was directed to *all* of the testimony and not merely confined to the objectionable part, the objection being in the following words:

"Whereupon defendant renewed its objections to *any* evidence regarding said letter, and moved to strike evidence concerning the same out." (Italics ours.) Tr. p. 67.]

Second, the ground which is urged on appeal that the testimony was a pure conclusion of the witness, as a basis for the motion to strike, was not presented to the District Court and therefore will not be considered by the Appellate Court.

FOURTH.

There Was Evidence to Support the Findings of the Court.

(1) Where the Record Does Not Purport to Contain All the Evidence It Will Be Presumed That There Was Sufficient Competent Evidence to Support the Findings of Fact and Judgment of the Court.

Hecht v. Alfaro, 10 Fed. (2d) 464;
Wilmon v. Aros, 191 Cal. 80; 214 Pac. 962;
Shuken v. Cohen, 179 Cal. 279; 176 Pac. 447;
Berri v. Rogero, 168 Cal. 736; 145 Pac. 95;
Western California L. Co. v. Welch, 41 Cal. App. 435; 183 Pac. 169;
Runyon v. City of Los Angeles. 40 Cal. App. 383; 180 Pac. 837;
Davies v. Stark, 25 Cal. App. 519; 144 Pac. 315;
Bagley v. Bloom, 19 Cal. App. 255; 125 Pac. 931.

In the case of *Western California L. Co. v. Welch,* 41 Cal. App. 435 (183 Pac. 169), at page 438, the court said:

> "(4) But we find, however, in the record of defendants' bill of exceptions that the defendants introduced in evidence a deed from the Los Angeles Title and Trust Company to plaintiff's grantor, the Title Guaranty and Trust Company, antedating the deed to plaintiff. *The contents of this instrument are not set out.* It does not even appear whether it was a deed to the land in question. Nothing, however, appears to the contrary. It may have contained recitals as to grantor's source of title that would estop defendants from claiming against it.

This deed was put in evidence by defendants, and they would be bound by its recitals. *The law will presume, where the extent and nature of the evidence is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings.* The burden is upon appellant to affirmatively show, by production of all the evidence on the point, that the ruling or finding was erroneous." (Italics ours.)

In the case of *Runyon v. City of Los Angeles,* 40 Cal. App. 383 (180 Pac. 837), at page 387, the court says:

"(2) *The record before us, as presented by the bill of exceptions, contains a part of the evidence, it appearing affirmatively therefrom that several witnesses, none of whose testimony is set forth, were sworn and testified. This being so, we very properly might affirm the judgment without any further discussion.* * * *

* * * *though the failure to include all the evidence in the bill of exceptions necessarily will compel us to resolve every material question of fact against appellants."* (Italics ours.)

In the case of *Davies v. Stark, et al.,* 25 Cal. App. 519 (144 Pac. 315), at page 520, the court says:

"No attack is made upon the findings, and *while the bill of exceptions discloses no evidence showing that plaintiff was damaged in any sum whatsoever,* or that defendants detained possession of the property, *we must, since the bill of exceptions does not purport to contain all of the evidence,* but only such parts of the record upon which defendants based their claim for a new trial, *indulge in the presump-*

tion that there was sufficient evidence adduced to justify the court in making the finding. Every presumption is in favor of the regularity of the judgment and proceedings upon which it is based, and to justify a reversal it devolves upon appellant to *affirmatively show error.*" (Italics ours.)

In the case of *Berri v. Rogero,* 168 Cal. 736 (145 Pac. 95), at page 741, the court says:

"But it appears from the order itself that, in addition to the affidavits of the defendant, oral evidence was heard upon the motions and that upon this evidence, as well as upon the affidavits, the order was made. That being so, this court must presume, even if it be conceded that the affidavits in themselves were insufficient to sustain the order, that the oral testimony introduced upon the hearing warranted the court in setting aside the default and judgment. *It is a well-settled rule of law that where evidence is omitted from the record this court must presume that the omitted evidence fully justified the order appealed from, although the evidence contained in the record itself is insufficient.*" (Italics ours.)

In the case of *Shuken v. Cohen,* 179 Cal. 279 (176 Pac. 447), at page 283, the court says:

"There is no force in the contention that the findings do not sustain the complaint or the amended complaint. *No part of the evidence except certain of the exhibits appears in the transcript, so we must assume that all of the findings are supported by ample proof.*" (Italics ours.)

In the case of *Wilmon v. Aros,* 191 Cal. 80 (214 Pac. 962), at page 82, the court says:

"The bill of exceptions does not set out all the evidence and we are uninformed upon what record the court acted. The judgment must, therefore, be affirmed upon the presumption that the court below decided correctly upon all the evidence before it. (*Gates v. Buckingham*, 4 Cal. 286; *Miller v. Dailey*, 136 Cal. 212, 220 (68 Pac. 1029).)"

In the case of *Bagley v. Bloom*, 19 Cal. App. 255 (125 Pac. 931), at page 266, the court says:

"Of course, 'all intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired unless the record itself shows to the contrary.' (*Morrissey v. Gray*, 162 Cal. 638 (124 Pac. 246).)"

In the case of *Hecht v. Alfaro*, 10 Fed. (2d) 464, at page 466, this court says:

"The plaintiff asserts that the sole issue upon the trial in the court below was as to whose duty it was to secure the transportation of the coffee. *He presents for the consideration in this court assignments of error directed to the verdict and the judgment, which he contends are erroneous, in that they are wholly unsupported by any evidence* of the defendant's performance of the contract, and he contends that under the evidence the obligation to furnish transportation and to furnish it during the month of May, 1920, rested upon the defendant. *Such assignments present nothing for the consideration of an appellate court. They bring up for review no ruling of the trial court. They do not show that at any point in the proceedings the court below committed error. Upon no question thus presented does*

it appear that the trial court was requested to make a ruling or give an instruction to the jury. This court has no authority to retry an action at law and render such judgment as we may think should have been rendered. We can review only rulings made by the trial court on questions brought to its attention and passed upon by it. Oregon R. & Nav. Co. v. Dumas, 181 F. 781, 104 C. C. A. 641; Bort v. E. H. McCutchen & Co., 187 F. 798, 109 C. C. A. 558; United States v. National City Bank (C. C. A.) 281 F. 754. These considerations are sufficient to dispose of the case upon the writ of error from this court." (Italics ours.)

(2) WHERE THE BILL OF EXCEPTIONS RECITES THAT CERTAIN EVIDENCE WAS INTRODUCED AT THE TRIAL AND THE EVIDENCE IS NOT SET FORTH IN FULL IN THE BILL OF EXCEPTIONS IT WILL BE PRESUMED ON APPEAL THAT THE SHOWING MADE THEREUNDER SUPPORTS THE FINDINGS OF THE TRIAL COURT.

In the case of *Fonner v. Martens*, 186 Cal. 623 (200 Pac. 405), at page 624, the court says:

"The bill of exceptions on this appeal does not include the judgment roll in the partition suit, but it recites that it was introduced in evidence on the trial, and we are, therefore, bound to assume that the showing made thereunder supports the findings of the trial court. (*Western California Land Co. v. Welch,* 41 Cal. App. 435 (183 Pac. 169).)"

Assuming for the purpose of argument that the evidence hereinafter referred to does not of itself support the findings of the trial court, nevertheless defendant may not in view of the foregoing rules and the record

in the instant case, attack the findings of the trial court on this writ of error. The record does not purport to contain all of the evidence received at the trial. For example in the transcript appear the following recitals as to the introduction of evidence, which evidence and exhibits are not set forth in the transcript.

"Plaintiff here offered Defendant's Exhibits 16, 37, 38, 39, 138, 139, 142 and 144, as to that portion of those exhibits which contained on the stationery of S. Reid Holland the following: 'Graver Corporation, inter office correspondence, Date, File No., To, Address, From.'" Tr. p. 58.]

"Defendant's Exhibit A-103 attached to the deposition was here introduced by the plaintiff.

'This telegram was sent by Mr. A. A. Butler, our sales manager. To a certain extent he had authority to send it, it was customary for him to send telegrams in the course of his duties.'" [Tr. pp. 46, 47.]

"Defendant's Exhibit 'B' was here introduced in evidence after the words 'as hereinafter shown there is a crease showing that at one time it had been folded at that place,' and after the crease is the sentence, 'Trusting you will get after Getty, etc.'" [Tr. p. 77.]

Again in plaintiff's opening brief appears this statement:

"We have shown that Holland testified that no such letter had existed, and it appears from the transcript that the testimony of the Gravers was taken in Chicago, and a great volume of correspondence attached to the depositions. If there is anything in that correspondence which supports plaintiff in error, we ask why such letters were freely given upon deposition, when one other letter has left no trace in anybody's files." (Opening Brief p. 12.)

(3) In an Action at Law Tried in a Federal Court Without a Jury Findings of Fact Made by the Trial Court on Conflicting Evidence Are Conclusive in the Appellate Court.

Behn v. Campbell, 205 U. S. 407;
Dooley v. Pease, 180 U. S. 126;
Felker v. First Nat. Bank, 196 Fed. 200;
Pacific S. Metal Works v. California Canneries Co., 164 Fed. 980;
Syracuse Tp. v. Rollins, 104 Fed. 958.

In the case of *Behn v. Campbell,* 205 U. S. 407, at page 407, it is said:

> "An appeal brings up questions of fact as well as of law, but *upon a writ of error only questions of law apparent on the record can be considered and there can be no inquiry whether there was error in dealing with questions of fact.*" (Italics ours.)

In the case of *Dooley v. Pease,* 180 U. S. 126, at page 131, it is said:

> "Where a case is tried by the court, a jury having been waived, *its findings upon questions of fact are conclusive in the courts of review.* It matters not however convincing the argument that upon the evidence the findings should have been different. Stanley v. Supervisors, 121 U. S. 547." (Italics ours.)

In the case of *Syracuse Tp. v. Rollins,* 104 Fed. 958, at page 961, the court says:

> "Six of the assignments of error are to the effect that the *facts found by the trial court are not supported by the evidence. But it is well settled that*

when the trial court to which a cause has been submitted makes a special finding of facts this court has not authority to inquire whether the evidence supports the findings, but only whether the facts found support the judgment." (Italics ours.)

In the case of *Felker v. First Nat. Bank*, 196 Fed. 200, at page 202, the court says:

"(3) The next error assigned is that 'the court erred in finding that the plaintiff had purchased said drafts and was the owner thereof,' and we are asked to review the evidence taken before the court on that issue and reverse its finding. This we cannot do. *When a jury is waived and a special finding of facts made by the trial court, an appellate court cannot review the evidence to ascertain its preponderance on one side or the other.* The findings as made must stand if there was any substantial evidence to sustain them. (4) Whether that was the case may be made a question of law for review in an appellate court, by requesting the trial judge to make some declaration that there was no such evidence or to render a judgment for the appropriate party because there was no such evidence, and, upon his refusal to do so, taking proper exception and assigning error thereon. Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; York v. Washburn, 64 C. C. A. 132, 129 Fed. 564, 566; United States Fidelity & Guaranty Co. v. Board of Com'rs, 76 C. C. A. 114, 145 Fed. 144, 151, cases cited. No such question of law was raised or decided below and for that reason cannot now be considered by us. Section 700 of the Revised Statutes 1878 (U. S. Comp. St. 1901, p. 570) provides as follows:

'When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.'

No rulings in the progress of the trial which were excepted to at the time are presented by the bill of exceptions for our consideration." (Italics ours.)

In the case of *Pacific S. Metal Works v. California Canneries Co.*, 164 Fed. 980, at page 982, this court says:

"1. The plaintiff in error insists that the Circuit Court erred in finding that there was a failure on its part to deliver 143,000 or any number of cans, required or needed by the defendant in error at its cannery. *Whether there was such failure or not is a pure question of fact, and this being an action at law, and before us on writ of error, the finding of the Circuit Court as to the fact, if there was any evidence upon which to base the finding, is conclusive here.*"

(4) Matters Not Assigned as Error Will Not Be Considered by the Appellate Court.

Wood v. Wilbert, 226 U. S. 384;
Childs, et al., v. United States, 5 Fed. (2d) 816;
Russell v. Huntington Nat. Bank, 162 Fed. 868;
Louie Share Gan v. White, 258 Fed. 798;
Wight v. Washoe County Bank, 251 Fed. 819.

Rule 11 of the United States Circuit Courts of Appeals (150 Fed. XXVII) reads in part as follows:

> "The plaintiff in error or appellant shall file with the clerk of the court below, * * * an assignment of errors * * *. * * * When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded * * *."

In the case of *Wood v. Wilbert,* 226 U. S. 384, at page 386, the court says:

> "It is urged further that neither the exception nor the demurrer complied with the 31st equity rule in that the appellees did not make affidavit that they were not interposed for delay. *It is sufficient to answer that the objection was not made in the court* below *and is not assigned as error on this appeal."* (Italics ours.)

In the case of *Childs, et al., v. United States,* 5 Fed. (2d) 816, at page 817, the court says:

> "In the argument before this court appellants urged both the defense of innocent purchaser and the bar of laches. *Neither of these matters are assigned as error, and they cannot be considered here;* * * *." (Italics ours.)

In the case of *Wight v. Washoe County Bank,* 251 Fed. 819, at page 822, this court says:

> "No assignment of error presenting this point was made, and we therefore pass it, merely observing, however, that the principle seems inapplicable to the case."

In the case of *Louie Share Gan v. White,* 258 Fed. 798, at page 799, this court says:

> "The objection to the proceedings in that case was not raised in this case in the court below and was not assigned as error in the appeal to this court. It was not mentioned until after the case had been submitted in this court. In the absence of a record presenting such an objection, it cannot be considered on appeal."

In the case of *Russel v. Huntington Nat. Bank*, 162 Fed. 868, at page 871, the court says:

> "Errors not assigned according to the rule will be disregarded. Under rule No. 11 (150 Fed. XXVII, 79 C. C. A. XXVII), therefore, the sixth assignment is not considered."

A perusal of the assignment of errors in the case at bar discloses the fact that defendant has not assigned as error any of the findings of fact of the District Court, in accordance with the requirements of rule 11 of the United States Circuit Courts of Appeals. Defendant is not therefore entitled to have the Appellate Court review the District Court's findings of fact. [Tr. p. 87.]

A. Plaintiff and Defendant Entered Into an Agreement in Writing.

The agreement between plaintiff and defendant was introduced in evidence at the trial and is set forth in the transcript as Plaintiff's Exhibit 1 and is executed as follows:

"Yours truly,
Graver Corporation,
By S. Reid Holland

Accepted
Hercules Gasoline Co.,
By C. R. Bird." [Tr. p. 63.]

In this connection it is to be noted that the original contract did not bear the notation:

"Approved.

Graver Corporation

East Chicago, Ind.

By....."

[Tr. p. 63.]

A stipulation filed with the clerk of the United States Circuit Court for the Ninth Circuit on or about the 24th day of May, 1926, is to the effect that the inclusion in the transcript of these words on Exhibit No. 1 at page 63 of the transcript was through an error.

B. S. Reid Holland Was Authorized to Execute the Agreement on Behalf of Defendant.

The testimony shows that the defendant wired to Geo. F. Getty to make its settlement for Graver Tank No. 2 through Holland, Exhibit 103. [Tr. p. 41.]

In Exhibit 67 [Tr. p. 52] a letter from defendant to S. Reid Holland, the defendant recognized that its agent S. Reid Holland had obligated it to the Hercules Gasoline Company. The letter reads in part as follows:

"It looks as if you will have to play a fine Italian hand with the Hercules Company to keep from getting us in bad, and I want you to keep us posted regarding the situation.

Yours very truly,

Graver Corporation

Vice President."

[Tr. p. 53.]

Further, the direct testimony of three witnesses was to the effect that the defendant had written a letter to

S. Reid Holland authorizing him to act for the defendant on the Pacific Coast.

C. R. Bird's testimony was as follows:

"In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on a Graver letterhead signed Graver Corporation by W. F. Graver. This letter was a long one and I did not see all of it. The gist of the part that I saw was that *Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation*, particularly the settlement of the tank deal with Getty." [Tr. pp. 61, 62.]

H. P. Grimm testified as follows:

"Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery signed by one of the Gravers, tending to show Holland had authority to act for Graver Corporation." [Tr. p. 69.]

"I remember the letter distinctly because Holland said, 'Here is a letter from Graver Corporation with their heading on,' tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; it was signed by one of the Gravers whose initials begin with a 'W'." [Tr. p. 70.]

Andrew Mattei, Jr., testified as follows:

Bird and Grimm were skeptical about Holland's authority; he produced a letter with Graver Corporation printed on it at the head and folded it over and showed the lower portion. *The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles;* it was signed Graver Corporation by W. F. Graver." [Tr. p. 71.]

C. It Is Not True That S. Reid Holland Was Not Authorized by Defendant to Execute the Agreement Sued Upon.

The portions of the record heretofore cited show conclusively that the trial court's finding upon this issue was supported by evidence.

D. Plaintiff Produced Due Evidence of Having Acquired Title to Graver Tank No. 2.

Exhibit 38, a letter from S. Reid Holland to defendant, received in evidence, read in part as follows:

"Hercules agreed and did purchase tank #2 and at this writing it is their property." [Tr. p. 56.]

C. R. Bird testified as follows:

"S. Reid Holland was in Getty's office when this deal was made and saw the initial payment made by us on the tank and he saw the bill of sale which was handed to us.

* * * * * * * * * *

This was about the first week in February, 1924. This bill of sale was delivered and acknowledged October 10th, but it was executed before that. The initial payment was $3,000, and we paid $3,000. a month thereafter until the total of nine payments were made." [Tr. pp. 67, 88.]

In short the defendant asks this court to review on a writ of error the findings of the District Court based upon conflicting evidence. For example, in defendant's Opening Brief it is said:

"We ask Your Honor to scrutinize the testimony of Bird and Grimm, who were 'skeptical about Holland's authority,' and who now talk about a letter which they saw at a distance, folded in such a way that only the

last paragraph could be seen, and signed by some one whose signature they could not recognize." (Opening Brief, p. 13.)

In other words, defendant asks the Appellate Court to weigh the evidence given by Holland as against the testimony given by Bird, Grimm and Mattei, and then say that the District Court erred in believing the testimony of the latter and disbelieving the testimony of Holland.

It is respectfully submitted that the judgment of the District Court in favor of plaintiff should be affirmed.

Los Angeles, California, September 23, 1926.

McComb & Hall,
Marshall F. McComb,
John M. Hall,
Attorneys for Defendant in Error.

No. 4859.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

PETITION FOR REHEARING.

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No. 4859.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

Petition for a Re-Hearing on the Ground That the United States Circuit Court of Appeals Was Without Jurisdiction to Review the Sufficiency of the Evidence to Sustain the Judgment of the District Court for the Reason That There was Not Filed With the Clerk of the District Court a Written Stipulation, Signed by the Parties, Providing for the Trial of the Case by the Court Without the Intervention of a Jury in Compliance With the Requirements of Sections 649 and 700 of the Revised Statutes.

To the Honorable Circuit Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

The undersigned, your petitioner, respectfully submits that it has been aggrieved by an opinion of Your Honors rendered herein on October 25, 1926, in respects hereinafter set forth and prays for a re-hearing of said matter.

FACTS.

The above entitled case came before this court upon a writ of error after a trial before the District Court sitting without a jury. This court, speaking through Judge Neterer, reversed the judgment of the District Court on the sole ground that there was not sufficient competent evidence to support the finding of the District Court that S. Reid Holland was authorized by the Graver Corporation to execute the contract which was the basis of the suit. As pointed out in the reply brief of the plaintiff, only questions of law may be considered upon a writ of error and there can be no inquiry whether there was error in dealing with questions of fact. (Reply Brief p. 67.) Particularly is this true where, as in the case at bar, the parties have not filed with the Clerk of the District Court a written stipulation, signed by them, providing for the trial of the case by the court without the intervention of a jury.

In the case at bar there was no written stipulation signed by the parties filed with the Clerk of the District Court providing for the trial of the case by that court without the intervention of a jury.

This court therefore acted *without jurisdiction* in reviewing the evidence received by the District Court and in reversing the judgment of the District Court on the sole ground that there was not competent evidence to support the judgment.

AUTHORITIES.

The Circuit Court of Appeals Is Without Jurisdiction to Review on a Writ of Error the Sufficiency of the Evidence to Support the Judgment in a Case Tried Before the District Court Without a Jury, No Written Stipulation, Signed by the Parties, Waiving a Trial by Jury, Having Been Filed With the Clerk of the District Court as Required by Sections 649 and 700 of the Revised Statutes.

In the case of *Bouldin, et al., v. Alto Mines Co.*, 299 Fed. 301, (*Circuit Court of Appeals, 9th Circuit*), this court, speaking through Judge Rudkin, says at page 302:

> "This is a *writ of error* to review a judgment in an action at law tried by the court without a jury. In such cases the rule is firmly established that the *jurisdiction of this court* to review the rulings of the court below, with minor exceptions not material here, is dependent upon a compliance with the requirements of section 649 of the Revised Statutes (Comp. St., Sec. 1587), namely, the filing with the clerk of a stipulation in writing waiving a jury. *No other waiver will suffice, and in the absence of such a stipulation, we can only look to the process, pleadings, and judgment.* Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Road Imp. District v. St. Louis S. W. Ry. Co., 257 U. S. 547, 562, 42 Sup. Ct. 250, 66 L. Ed. 364; Columbus Compress Co. v. United States F. & G. Co., 186 Fed. 487, 108 C. C. A. 465; Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 Fed. 310, 134 C. C. A. 106; Ford v. United States, 260 Fed. 657, 171 C. C. A. 421.
>
> There is no error apparent upon the face of the record, and the judgment of the court below must therefore be affirmed." (Italics ours.)

In the case of *Emerzian v. S. J. Kornblum & William Kornblum,* 3 Fed. (2d) 995 (*Circuit Court of Appeals, 9th Circuit*), Judge Rudkin, speaking for this court, says at page 995:

> "This is a writ of error to review a judgment in an action at law tried by the court without the intervention of a jury. *There was no stipulation in writing waiving a jury filed with the clerk,* as required by section 649 of the Revised Statutes (Comp. St., Sec. 1587). *In the absence of such a stipulation it has been held in an almost endless line of decisions that rulings made in the progress of the trial cannot be reviewed by an appellate court,* unless error appears on the face of the process, pleadings, or judgment. Duncan v. Atchison, T. & S. F. R. Co., 72 F. 808, 19 C. C. A. 202; Erkel v. United States, 169 F. 623, 95 C. C. A. 151; Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 F. 310, 134 C. C. A. 106; Bouldin v. Alto Mines Co. (C. C. A.) 299 F. 301; United States v. McGovern (C. C. A.) 299 F. 302.
>
> The judgment of the court below is therefore affirmed." (Italics ours.)

In the case of *United States v. M'Govern,* 299 Fed. 302 (*Circuit Court of Appeals, 9th Circuit*), Judge Hunt, speaking for this court, says at page 303:

> "Counsel for defendant in error questions the *power* of this court to review the rulings of the District Court, because it does not appear that the parties or their counsel complied with section 649 of the Revised Statutes (Comp. St., section 1587), by filing a stipulation in *writing* waiving a jury. The point is well taken, and upon the authority of our decision in Bouldin *et al.* v. Alto Mines Co., 299 Fed.

301 (decided May 26, 1924), we are confined to an examination of the *process pleadings and judgment.* Commissioners v. St. Louis S. W. R. Co., 257 U. S. 547, 42 Sup. Ct. 250, 66 L. Ed. 364." (Italics ours.)

In the case of *Ladd & Tilton Bank v. Lewis A. Hicks Co.,* 218 Fed. 310 (*Circuit Court of Appeals, 9th Circuit*), this court speaking through Judge Van Fleet says at page 311:

> "A jury was dispensed with *by consent of the parties expressed orally in open court, but no stipulation in writing evidencing the waiver was had or filed;* and the assignments of error are all based upon rulings had at the trial.
>
> In this state of the record the defendant in error makes the point that the errors assigned may not competently be inquired into by this court; and we are of opinion that this objection must prevail, at least as to all but a single assignment to be noticed later. The objection is based upon the limitations which circumscribe these courts in trials of issues of fact in actions at law; the statute requiring that they be tried by a jury (section 648, R. S. (U. S. Comp. St. 1913, Sec. 1584)), unless the jury be waived by a stipulation in writing (section 649 (section 1587)), when the facts may be tried by the court and its rulings reviewed as provided in section 700 (section 1668). These provisions have been construed, so far as the right to review is concerned, *as jurisdictional;* and in the absence of a compliance therewith, except the facts be admitted by the parties in a case stated, no question is open for review on error other than 'those arising upon the *process, pleadings, or judgment.*' Erkel v. United States, 169 Fed. 623, 624, 95 C. C. A. 151, 152. In that case the rule and its reason are thus stated by Judge Gilbert:

'It is well settled that no question of law can be reviewed on error, except those arising upon the process, pleadings, or judgment, 'unless the facts are found by a jury by a general or special verdict, or are admitted by the parties upon a case stated.' Campbell v. Boyreau, 21 How. 223, 16 L. Ed. 96. In that case it was held that the finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. The court said: 'And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties.'

As all the leading cases in support of these principles are there cited, further consideration of the question is unnecessary, since it is in no respect left in doubt.

While those sections of the statute applied originally only to trials in the late Circuit Courts, they were, on the abolishment of those courts, given application to the present District Courts. Judicial Code, Sec. 291 (Act March 3, 1911, c. 231, 36 Stat. 1167 (U. S. Comp. St. 1913, Sec. 1268).)" (Italics ours.)

In the case of *St. Louis S. W. Ry. Co. v. Com'rs of Road Imp. Dist. No. 2,* 265 Fed. 524, at page 528, the court says:

"The cases cited by plaintiffs' counsel are not in point. The suit being in the federal court at law to recover a sum of money, each party in that court was entitled to a jury, unless waived in the manner provided by the federal law. *A question of jurisdic-*

tion is therefore presented, which it is our duty to notice, whether assigned as error or not. Section 649, U. S. R. S. (Comp. St., Sec. 1587), provides how the court below might try the case without the intervention of a jury, namely, 'whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury.' Section 700, U. S. R. S. (Comp. St. Sec. 1668) provides that certain questions can be considered by this court when it has been tried without a jury in accordance with section 649. In the case at bar, neither the parties nor their attorneys of record filed a stipulation in writing with the clerk waiving a jury; but the court of its own motion withdrew the case from the jury, and each party, without objection to such action of the court, presented findings of fact and conclusions of law to the court for its approval. The case, therefore, stands as a civil case at law tried by the court without any waiver of the jury as the law provides. Where this is so, and the facts are not admitted in a case stated, *we have no jurisdiction to review any question on a writ of error, except those which arise on the process, pleadings, or judgment,* and no such question appears." (Italics ours.)

In the case of *James-Dickenson Farm Mortgage Company, et al., v. Seimer,* 12 Fed. (2d) at 772 it is said:

"The cause was tried by the court without a jury, *a jury being waived. No stipulation in writing* waiving a jury was filed with the clerk, as required by section 649 of the Revised Statutes (Comp. St., Sec. 1587). Under section 700 of the Revised Statutes 'the rulings of the court in the progress of the trial' may be reviewed when a stipulation, waiving a jury, has been filed with the clerk as provided in section

649, but not so when the jury is waived orally, as in this case. In such case it is settled law that none of the questions decided at the trial can be re-examined on writ of error. Among the many cases so holding we may note the following: Bond v. Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835; Spalding v. Manasse, 131 U. S. 65, 9 S. Ct. 649, 33 L. Ed. 86; County of Madison v. Warren, 106 U. S. 622, 2 S. Ct. 86, 27 L. Ed. 311; Erkel v. United States, 169 F. 623, 95 C. C. A. 151; Ladd & Tilton Bank v. Hicks Co., 218 F. 310, 134 C. C. A. 106; Illinois Surety Co. v. United States, 229 F. 527, 143 C. C. A. 595; United States v. National City Bank (C. C. A.) 281 F. 754." (Italics ours.)

In the case of *United States v. National City Bank of New York,* 281 Fed. 754, at page 758, the court says:

"When a case is tried in a federal court without a jury, and without a *written stipulation waiving* a jury trial, certain important consequences follow. The statutes of the United States provide that the trial of issues of fact in the District Courts, in all causes except in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. Rev. St., Sec. 566 (Comp. St., Sec. 1583). Then it is provided that issues of fact in civil cases may be tried and determined by the court, without the intervention of a jury, 'whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury', and that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. Rev. St., Sec. 649 (Comp. St., Sec. 1587). And it is provided in Rev. St., Sec. 700 (Comp. St., Sec. 1668) that:

'When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.'

It appears from what has already been said that at the opening of the trial in this case, when counsel for the bank stated that he would waive the right to a jury trial, the court at once suggested:

'Then you will have to have a signed stipulation that this may be tried without a jury.'

Counsel for the government did not seem to grasp the significance of the suggestion. At any rate, while he insisted that the matter should be tried without a jury, he claimed no waiver was necessary, and the case went to trial without a jury, and without any written stipulation waiving the jury. The result is that *no question is now open to review in this court on the writ of error,* except it be one arising upon the *process, pleadings or judgment.* This court had occasion to consider the subject in Illinois Surety Co. v. United States, 229 Fed. 527, 143 C. C. A. 595. We declared in that case that, as there had been no written stipulation waiving a jury trial and the case had nevertheless been tried without a jury, it was—

'Well settled that none of the questions decided at the trial can be re-examined in this court on writ of error. No questions, therefore, are open to review on error, except they arise upon the process, pleadings, or judgment'." (Italics ours.)

In the case of *Crouch v. United States,* 8 Fed. (2d) 435, at page 436, the court says:

> "A motion on behalf of the United States was then made in this court to dismiss the writ of error on the ground that, inasmuch as the case was tried without a jury, in the absence of the statutory written stipulation waiving a jury trial, the decision below was not a judicial determination, and therefore, not subject to re-examination in the appellate court. *The general rule is now too well settled for question that in a jury case a trial and decision by a judge without the written waiver of a jury trial prescribed by statute is no more than the decision of an arbitrator, and cannot be reviewed on appeal.* Campbell v. United States, 224 U. S. 99, 32 S. Ct. 398, 56 L. Ed. 684." (Italics ours.)

In the case of *Twist v. Prairie Oil & Gas Co.,* 6 Fed. (2d) 347, at page 350 the court says:

> "Considering these cases in that manner, viz., as civil cases at law tried to the court without a waiver of jury as provided by law, it is clear that this court *has no jurisdiction* to review any question except those which arise on the *process, pleadings, or judgments.*" (Italics ours.)

(1) Unless It Affirmatively Appears From the Record That a Written Stipulation, Signed by the Respective Counsel Waiving a Jury, Was Filed With the Clerk of the District Court as Required by Rev. Stat., Sections 649 and 700, the Circuit Court of Appeals Is Without Jurisdiction to Review Alleged Errors in Rulings of the District Court, at the Trial of an Action at Law, and the Facts Found by the District Court Cannot Be Noticed by the Circuit Court of Appeals for Any Purpose.

In the case of *Duncan v. Atchison T. & S. F. R. Co.*, 72 Fed. 808 (*Circuit Court of Appeals, 9th Circuit*), this court says at page 810:

> "No alleged error concerning the rulings of the circuit court at the trial of a cause by the court without a jury can be examined in the Circuit Court of Appeals, *unless it affirmatively appears from the record that there was a written stipulation, signed by the respective counsel, waiving a jury, as required by the statutes of the United States.* In Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, the court said: * * * Since the passage of this statute, it is equally well settled, by a series of decisions, that this court cannot consider the correctness of rulings at the trial of an action by the circuit court without a jury, *unless the record shows such a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk.* Flanders v. Tweed, 9 Wall 425; Kearney v. Case, 12 Wall 275; Gilman v. Telegraph Co., 91 U. S. 603, 614; Madison Co. v. Warren, 106 U. S. 622, 2 Sup. Ct. 86; Alexander Co. v. Kimball, 106 U. S. 623, note, 2 Sup. Ct. 86.'

In Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158, 160, the Circuit Court of Appeals said:

'There is in the record what purports to be a special finding of the facts by the court. *But the record does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury,* as required by section 649 of the Revised Statutes of the United States.' *The recital in the record that 'both parties in open court, having waived a jury, and agreed to trial before the court', does not show a compliance with section 649.* The following recitals in the record have been held insufficient for this purpose: 'The issue joined by consent is tried by the court, *a jury being waived'*, and 'the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury', and 'the parties having stipulated to submit the case for trial by the court without the intervention of a jury', and 'said cause being tried by the court without a jury, by agreement of parties' and 'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, *a jury being waived by both parties'*. * * * The sufficiency of the facts found by the lower court to support the judgment can only be considered by this court when a jury has been waived in writing, as provided in section 649. *When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury.'*

See, also, to the same effect, Investment Co. v. Hughes, 124 U. S. 157, 160, 8 Sup. Ct. 377, Spalding v. Mahasse, 131 U. S. 65, 9 Sup. Ct. 649; Merrill v. Floyd, 3 C. C. A. 494, 53 Fed. 172; Branch

v. Lumber Manuf'g Co., 4 C. C. A. 52, 53 Fed. 849; Bowden v. Burnham, 8 C. C. A. 248, 59 Fed. 753; Cudahy Packing Co. v. Sioux Nat. Bank, 16 C. C. A. 409, 69 Fed. 782.

From these decisions it necessarily follows that the findings of the circuit court, based upon the evidence in the case, cannot be reviewed by this court." (Italics ours.)

In the case of *City of Cleveland v. Walsh Construction Co.*, 279 Fed. 57, at page 61, the court says:

"As affecting the action of the trial court only, it is immaterial whether the waiver be written or oral, and whether it be express or implied; *but only when it affirmatively appears by the record that the waiver was written can there be the full review which is contemplated by section 700, and which is analogous to that following upon a jury trial.*" (Italics ours.)

(2) The Circuit Court of Appeals Is Bound of Its Own Motion, Independent of Objection by Either Party, to Decline to Act Unless It Affirmatively Appears From the Record That It Has Jurisdiction.

In the following cases the record failed to disclose that the parties had complied with the requirements of sections 649 and 700 Rev. Stat. by filing with the Clerk of the District Court a written stipulation, signed by the parties, waiving a jury trial, and the Circuit Court of Appeals in each case held it was without jurisdiction to review errors occurring at the trial.

In the case of *Ladd & Tilton Bank v. Lewis A. Hicks Co.*, 218 Fed. 310, cited *supra*, this court held that it was

without jurisdiction upon a writ of error to review errors occurring at the trial before the District Court and that it was limited in its examination to the process, pleadings and judgment. This court, speaking through Judge Van Fleet, says at page 311:

> "Nor is the objection, as urged, in any proper sense, technical, or one which the defendant in error is estopped, by its consent in the court below, from raising. *It is one which goes to the question of the court's power in the premises, and which it would be bound to regard independently of objection by a party.* Bond v. Dustin, 112 U. S. 604, 605, 5 Sup. Ct. 296, 28 L. Ed. 835." (Italics ours.)

In the case of *St. Louis S. W. Ry. Co. v. Com'rs of Road Imp. Dist. No. 2,* 265 Fed. 524, *cited supra,* the court say at page 528:

> "The cases cited by plaintiffs' counsel are not in point. The suit being in the federal court at law to recover a sum of money, each party in that court was entitled to a jury, unless waived in the manner provided by the federal law. *A question of jurisdiction is therefore presented, which it is our duty to notice, whether assigned as error or not."* (Italics ours.)

In the case of *La Belle Box Co. v. Stricklin,* 218 Fed. 529 at page 532 the court says:

> "No question of *jurisdiction* was ever suggested to the court below or *to this court,* but *we are bound* not to overlook any *jurisdictional defect* that the record may disclose. See cases cited in our opinion this day filed in R. R. v. Stephens, 218 Fed. 535, 134 C. C. A. 263." (Italics Ours.)

In the case of *Empire City Fire Ins. Co. v. American Cent. Ins. Co.,* 218 Fed. 774, at page 776 the court says:

> "We are not satisfied that the court was mistaken in dismissing the bill for the reasons thus stated, and we shall confine ourselves to the *question* of *jurisdiction—which, of course, we are bound to consider, even on our own motion.*" (Italics ours.)

In the case of *Garvin v. Kogler,* 272 Fed. 442 at page 443, the court says:

> *"It is equally fundamental that a federal appellate court will of its own motion deny its jurisdiction,* and that of the court from which the record comes, *unless jurisdiction affirmatively appears, although neither party raise the point in the argument.* King Iron Bridge & Mfg. Co. v. Otoe County, 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623; 1 U. S. Comp. St. 751, 755." (Italics ours.)

(3) A Recital in the Record That a Jury Was "Expressly Waived by the Parties" Does Not Show That a Written Stipulation Waiving a Jury Trial Was Filed as Required by Rev. Stat. Sections 649 and 700 Sufficient to Confer Upon the Circuit Court of Appeals Jurisdiction to Review the Sufficiency of the Evidence to Support the Judgment of the District Court.

In the case of *Rush v. Newman,* 58 Fed. 158, at page 160 the court says:

> "There is in the record what purports to be a special finding of facts by the court. But the record does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, as required by section 649 of the

Revised Statutes of the United States. *The recital in the record that 'both parties in open court having waived a jury, and agreed to trial before the court,' does not show a compliance with section 649.* The following recitals in the record have been held insufficient for this purpose: 'The issue joined, by consent, is tried by the court, a jury being waived:' and 'the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury:' and 'the parties having stipulated to submit the case for trial by the court without the intervention of a jury:' and 'said cause being tried by the court without a jury, by agreement of parties:' and *'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, a jury being waived by both parties';*—Bond v. Dustin, 112 U. S. 604, 608, 5 Sup. Ct. Rep. 296; and 'jury waived tentatively', and 'finding of facts and verdict,'—Merrill v. Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849. In the absence of a statute authorizing it, the finding of issues of fact by the court is not a judicial act of which this court can take any notice. Campbell v. Boyreau, 21 How. 223; Rogers v. U. S. 141 U. S. 548, 12 Sup. Ct. Rep. 91; Merrill v. Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849. *The sufficiency of the facts found by the lower court to support the judgment can only be considered by this court when a jury has been waived in writing, as provided in section 649. When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose,* and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the only question this court can consider is the sufficiency of the declaration to support the judgment. Flanders v. Tweed, 9 Wall. 425; Kearney v. Case,

12 Wall. 275; Alexander Co. v. Kimball, 106 U. S. 623, 2 Sup. Ct. Rep. 86; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. Rep. 296; Campbell v. Boyreau, 21 How. 223; Merrill v. Gloyd, 2 C. C. A. 58, 50 Fed. Rep. 849." (Italics ours.)

ARGUMENT.

The foregoing authorities are absolutely in point with the case at bar. *There was no written stipulation signed by the parties, waiving a jury trial, filed with the clerk of the District Court.* Even though such a stipulation had been filed with the clerk of the District Court, it would have been necessary in order to confer upon this court jurisdiction to review the sufficiency of the evidence to support the judgment, or to review errors of law occurring at the trial, that the record show affirmatively the making and filing of such stipulation with the clerk of the District Court. The only reference in the record to any waiver of a jury trial appears in the recital in the Findings of Fact and Conclusions of Law and Judgment, which is almost identical with a recital mentioned in the case of *Rush v. Newman* (*cited supra*). The recital in the case at bar is as follows:

"This cause came on regularly for trial in the above entitled court on October 15, 1925, before the Hon. Edward J. Henning, judge of said court, sitting without a jury, a jury having been expressly waived by the parties." [Tr. pp. 22, 27.]

This recital, in view of the authorities above cited, does not show a sufficient compliance with sections 649 and 700 of the Rev. Stat. to confer jurisdiction on this court to review errors, other than those arising on the process,

pleadings or judgment. Therefore, since this court found that the sole issue upon this writ of error was as to the authority of one S. Reid Holland to execute the contract on behalf of and as agent for the plaintiff in error (page 2 of the opinion), this court acted without jurisdiction in reviewing the findings of the District Court on this question, and in reversing the judgment of the District Court on the ground that the evidence before the District Court did not show that S. Reid Holland had such authority.

Wherefore, petitioner respectfully urges that a re-hearing may be granted, that the judgment of the District Court be affirmed, and that the mandate of this court may be stayed pending the disposition of this petition.

Respectfully submitted,

HERCULES GASOLINE COMPANY
By Its Attorneys
McCOMB & HALL,
MARSHALL F. McCOMB,
JOHN M. HALL.

I, Marshall F. McComb of Los Angeles, California, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit do certify that in my opinion the foregoing petition for re-hearing in the case of Graver Corporation, a corporation, v. Hercules Gasoline Company, a corporation, No. 4859, is well founded and is not presented for the purpose of creating a delay.

Dated: November 8, 1926.

MARSHALL F. McCOMB.